

# Washington Law Review

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Volume 43  
Number 1 *North Pacific Fisheries Symposium*

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10-1-1967

## Aspects of Internal Decision-Making Processes in Intergovernmental Fishery Commissions

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# ASPECTS OF INTERNAL DECISION-MAKING PROCESSES IN INTERGOVERNMENTAL FISHERY COMMISSIONS

WILLIAM T. BURKE\*

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I am grateful to several persons who have been kind enough to read earlier drafts of this paper, or parts thereof, and to comment thereon, including Professor Lewis Alexander, Dr. Jean Carroz, Dr. W. M. Chapman, Dr. Francis Christy, Dr. Lewis R. Day, Mrs. Georgiale Furniss, Dr. John L. Kask, Mr. Denton R. Moore, and Dr. M. B. Schaefer. None of these persons are in any way responsible for any of the errors of exposition or interpretation herein or for any omission.

I would also like to record my indebtedness to the Mershon Social Science Program of Ohio State University and its late director, Professor Edgar S. Furniss, Jr., for support in aid of the research underlying this paper.

## INTRODUCTION

The purpose of this paper is to examine certain aspects of the decision-making processes of intergovernmental institutions established for regulating interactions in the exploitation of ocean fisheries.<sup>1</sup> The aspects selected are those denominated as internal constitutional arrangements; embracing, more specifically, the grant of capacity to the group, membership provisions, structure, objectives, and distribution of certain authority functions within the commissions. Very little attention is devoted to the external decision-making process involving the fishery commissions with other participants, including members and other public or private entities which a more comprehensive study would embrace.<sup>2</sup> Fortunately, in light of anticipated developments in world fishery exploitation, responsible agencies and officials recognize

<sup>1</sup> For purposes of this paper eight commissions were studied. The commissions and their member states at the time of this writing are:

The International Pacific Halibut Commission (IPHC) (Halibut) (1953): Canada, United States.

The International Pacific Salmon Commission (Salmon) (1938, 1957): Canada, United States.

The International Whaling Commission (Whaling) (1948): Austria, Brazil, Canada, Ceylon, Cyprus, Czechoslovakia, Denmark, Ecuador, Finland, France, Ghana, Indonesia, Ireland, Italy, Jamaica, Latvia, Malaysia, Mexico, Monaco, Netherlands, New Zealand, Nicaragua, Nigeria, Norway, Poland, Sierra Leone, Spain, Sudan, Switzerland, Trinidad and Tobago, Turkey, United Arab Republic, United Kingdom, United States, Yugoslavia.

The Inter-American Tropical Tuna Commission (IATTC) (Tuna) (1950): Costa Rica, Ecuador, Mexico, Panama, United States.

The International Commission for the Northwest Atlantic Fisheries (ICNAF) (1950): Canada, Denmark, France, Federal Republic of Germany, Iceland, Italy, Norway, Poland, Portugal, Soviet Union, Spain, United Kingdom, United States.

The International North Pacific Fisheries Commission (INPFC) (1953): Canada, Japan, United States.

The Fur Seal Commission (Seal) (1957): Canada, Japan, Soviet Union, United States.

The Northeast Atlantic Fisheries Commission (NEAFC) (1963): Belgium, Denmark, Federal Republic of Germany, France, Iceland, Ireland, Netherlands, Norway, Poland, Portugal, Soviet Union, Spain, Sweden, United Kingdom.

The dates in parentheses refer to the date of effectiveness for the basic treaty (or treaties) examined in this paper. The order of listing is the order in which the commissions were created, an event which sometimes preceded the conclusion of the last agreement concerning the commission. Not all of these organizations were studied in the same detail due, as the text notes, to the differing availability of documents. See note 5 *infra*.

In referring subsequently to the constitutive documents for these organizations, no citation to their source is given since they are commonly available. A most useful compilation, prepared for the Senate Committee on Commerce, is LEGISLATIVE REFERENCE SERVICE OF THE LIBRARY OF CONGRESS, 89th CONG., 1st SESS., TREATIES AND OTHER INTERNATIONAL AGREEMENTS CONTAINING PROVISIONS ON COMMERCIAL FISHERIES, MARINE RESOURCES, SPORT FISHERIES AND WILDLIFE TO WHICH THE UNITED STATES IS A PARTY (1965). The Northeast Atlantic Fisheries Convention, to which the United States is not a party at this writing, is in Cmd. No. 2190.

<sup>2</sup> The outlines of this more comprehensive inquiry are in W. BURKE, OCEAN SCIENCES, TECHNOLOGY AND THE FUTURE INTERNATIONAL LAW OF THE SEA 80-85 (1966). The present discussion represents partial execution of one-fourth of this outline.

the necessity for inquiries similar if not the same as the present, and work on such projects is proceeding.<sup>3</sup>

Since this is a preliminary, and partial, undertaking, there is no need to apologize for the limited recourse to source material, though the fact should be noted. Ideally a study of decision-making processes would begin with documentary evidence and later acquire richness and depth through personal interviews and communication.<sup>4</sup> Here only the beginning stage was possible, primarily because of time limitations. In addition, even the available documentation is limited either because particular fishery commissions offer only brief public reports of their work or because documents are not publicly available. Commission practice in this respect varies enormously, ranging from virtually complete public disclosure to complete unwillingness to divulge even minor detail.<sup>5</sup>

## I. ESTABLISHMENT OF THE ORGANIZATION

### *A. Legal Capacity—Grant by Member States*

The states establishing a multilateral organization face no unique or difficult problems in clarifying the legal capacity of the group as an independent entity, assuming they have the will to do so. The major problem involved, if it can be called major, is that of avoiding such an excessively detailed specification of legal capacity that future contingencies can be met only through evasion, undue delay, or awkward

<sup>3</sup> The work of the Legislation Research Branch of the FAO is most prominent. See FAO LEGISLATION RESEARCH BRANCH, COMPARISON AND ABSTRACTS OF SELECTED CONVENTIONS ESTABLISHING FISHERIES COMMISSIONS (1962). See also: Carroz, *Establishment, Structure, Functions and Activities of International Fisheries Bodies*, I Indo-Pacific Fisheries Council, FAO Doc. FIb/T57 (1965); *id.* II Inter-American Tropical Tuna Commission, FAO Doc. FIb/T58 (1965); *id.* III Regional Fisheries Advisory Commission for the Southwest Atlantic, FAO Doc. FRm/T60 (1966); International Fisheries Bodies, FAO Doc. FI/T64 (En) (1966).

<sup>4</sup> McDougal & Lasswell, *The Identification and Appraisal of Diverse Systems of Public Order*, 53 AM. J. INT'L L. 1, 26 (1959) refer to these stages of inquiry into public order systems as follows:

Broadly conceived, the most promising strategy of inquiry moves from the well known to the less known, in this case implying that a beginning is made by employing the operations familiar to all legal scholars, then proceeding to the phases of the situation for which the social and behavioral sciences provide the sharpest instruments.

<sup>5</sup> It is pertinent to note here that inquiries were directed to all the fishery commissions mentioned in note 1, *supra* (except the Fur Seal Commission) seeking information and cooperation. The replies and subsequent communications were enlightening. Although all groups responded (some much later than others), it is apparent that certain of them have rather restrictive policies toward disclosure of information such as that sought in this study. Two bodies, the Salmon and the North Pacific Commissions, are worth special mention. The Salmon Commission policy is that any information concerning its operations, beyond that contained in its annual reports and scientific reports, must be sought from the respective signa-

administrative detours. The formula for such avoidance is not difficult to discover and to adopt. Should, on the other hand, states desire to confer only limited competence to perform legal acts, the problem is again not difficult, for a statement of circumscribed capacity is easily devised or, if need be, discovered in the charter of another comparable international group.<sup>6</sup> These alternatives do not exhaust the courses of action states may employ on this problem, for it is also possible to say nothing on the subject either because it does not occur to the negotiators to make explicit provision, perhaps assuming that capacity is implicit, or because the states do not wish to confer legal capacity.

All of the commission agreements, except the fur seal, halibut, and whaling agreements, envisage, with varying degrees of explicitness, the conferment of some, though limited, legal capacity upon the organization.<sup>7</sup> The North Pacific Convention is the most direct, article II(13) declaring that the Commission "may employ personnel and acquire facilities necessary for the performance of its functions." This is not, rather clearly, an extensive conferment of competence. Although

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tory governments and, in particular, from the Canadian Deputy Minister of Fisheries and, in the United States, the Special Assistant to the Under Secretary of State for Fisheries and Wildlife. With all due respect to these offices and the occupants thereof, it is doubtful whether this Commission decision promotes disclosure of relevant information. It seems quite obvious that the national officials concerned could not be expected to be in possession of many of the details about the operations of the Commission.

The North Pacific Commission policy places severe limitation upon access to information. By Commission decision the written proceedings of the annual meetings are "to be distributed only to those persons designated from among their nationals by each national section." 1957 INPFC ANN. REP. 4. Although the annual reports are made freely available, the much longer and more detailed Proceedings are not, yet these documents are indispensable to gaining even partial understanding of this Commission. Efforts to acquire these documents from the Commission have been unavailing despite oral and written requests to the American Section for the required designation. Eventually very brief access to these records was achieved through the not-too-imaginative, and inadequate, procedure of borrowing them for a brief period from the University of Washington Library, which is designated as an approved recipient.

Cooperation otherwise has been generous, particularly that of Lewis R. Day, Executive Secretary of ICNAF, and John L. Kask, Director of Investigations of the IATTC. Mr. Wilvan Van Campen, Executive Director of the North Pacific Commission, has also been helpful within the confines of the Commission policy mentioned above.

<sup>6</sup> See generally M. McDUGAL, H. LASSWELL & I. VLASIC, *LAW AND PUBLIC ORDER IN SPACE* 891-96 (1963) and literature cited therein.

<sup>7</sup> It is now commonly understood that questions of "capacity" may embrace both the competence of the body as an internationally independent body and the competence to act as a legal entity within national legal systems. As is noted in the following text discussion, this distinction is not clearly drawn in the fishing commission conventions. On some occasions the basic treaty provides for international capacity, as by referring to, or assuming, competence to conclude international agreements, and on other occasions provision is made for capacity within a member state, as in hiring personnel or acquiring facilities. The problem is never clearly formulated in the various conventions nor, as noted in the text, do any of the conventions deal very clearly with capacity, however it is formulated.

the salmon agreement does not use the language of legal competence it confers on the Commission the "power to improve spawning grounds, construct and maintain hatcheries, rearing ponds and other such facilities as it may determine to be necessary for the propagation of sockeye salmon in any of the waters covered by this Convention, and to stock any such waters with sockeye salmon by such methods as it may determine to be most desirable." Article VIII, however, dilutes the implication of competence which appears to be so clearly conveyed by article III by directing that the parties "acquire and place at the disposal of the Commission any land within its territory required for the construction and maintenance of hatcheries, rearing ponds, and other such facilities as set forth in Article III." Professor Swygard reports that within the Commission there were different opinions on the Commission's competence and that one member, at least, took the position that capacity is implied in the treaty.<sup>8</sup> Apparently this view was rejected in application to a number of problems even as the Commission in other situations acted as an independent entity.<sup>9</sup> Professor Swygard notes that the Commission had to resort to "more cumbersome devices . . . to assure the necessary action"<sup>10</sup> and that "the lack of Commission competence imposes definite limitations upon administration with the substitution of cumbersome and sometimes onerous procedures."<sup>11</sup>

The Tuna Convention of 1950 is further illustration of a somewhat indirect fashion of conferring capacity. Article I(13), in authorizing the Director of Investigations to disburse funds for the joint expenses of the Commission and to arrange for "cooperation with other organizations and individuals," by implication establishes the competence to make purchases and to enter into agreements as an independent entity. In practice the Commission, through the Director, operates on the assumption that its legal capacity is so established.<sup>12</sup>

Both of the North Atlantic Commissions, ICNAF and NEAFC, are expressly granted the capacity to enter into agreements with other international organizations "which have related objectives" and in

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<sup>8</sup> K. Swygard, *The International Halibut and Sockeye Salmon Fisheries Commissions: A Study in International Administration* 181 (unpublished Ph.D. thesis in University of Washington Library, 1948).

<sup>9</sup> *Id.* As in establishing charge accounts and chartering vessels.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.* at 182.

<sup>12</sup> Letter from Dr. John L. Kask, Director of Investigations, July 19, 1966. See also, e.g., [1950-1951] IATTC ANN. REP. 6 (cooperative agreement with Scripps Institution of Oceanography); 1952 *id.* at 29 (boat charter); 1954 *id.* at 8 (acquisition of facilities and equipment in Panama); 1956 *id.* at 69; 1959 *id.* at 13, 82; 1961 *id.* at 12 (research contracts).

both instances it is specified that "arrangements" may be made with, among other groups, the International Council for the Exploration of the Sea.<sup>13</sup> However, in the case of ICNAF, at least, the question of capacity to make other types of agreements became an issue. The clearest evidence of the view that this Commission is regarded as lacking even the elementary capacity to enter into some agreements is to be found in the handling of the problem of providing a staff pension plan. The Seventh Annual Report contains the following:<sup>14</sup>

It was stated by Mr. Clark that because the underwriting insurance company would be a Canadian one and subject to Canadian laws, the Canadian legal authorities had ruled that since the Commissions themselves did not have legal authority to enter into a contract, Canada was prepared to establish a corporation under the Canadian Companies Act which would enter into a contract with the insurance company on behalf of the Commissions.

Apparently the Commission shared this view of its capacity, for the proposed plan was adopted.

It is not known what other circuitous means have been employed to enable ICNAF to discharge its responsibilities under its charter. The "rule" of the "Canadian legal authorities," mentioned above, rests upon a highly refined and restrictive view of the convention and hardly seems a necessary interpretation of that instrument.

So far as the United States is concerned, provision for legal capacity of a commission within the United States is made in national legislation for both the Tuna and Halibut Commissions. Both are designated as "public international organizations," entitled to privileges and immunities as such, and "to the extent consistent with the instrument creating them, possess the capacity: (a) to contract; (b) to acquire and dispose of real and personal property; (c) to institute legal proceedings."<sup>15</sup> Apparently neither the Salmon, North Pacific nor the Northwest Atlantic Commissions are accorded a comparable designation in Canada, the host State, although other international organizations are given such status.

### *B. Membership in Commissions*

Policies relevant for determining membership provisions in the fishery commissions are positive and negative in nature. Effectiveness in achieving desired goals is promoted if all states whose nationals engage

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<sup>13</sup> ICNAF Convention, art. X(1); NEAFC Convention art. 11(1)-(2).

<sup>14</sup> [1956-1957] ICNAF ANN. REP. 11.

<sup>15</sup> 22 U.S.C. § 288 (1964).

in significant exploitation are formal participants in the machinery of decision. Inclusive membership arrangements, open to all states directly concerned with a fishery, permit the acceptance of responsibility by all such states and facilitate the process of imposing obligations upon them by easing the way to accession to membership. On the other hand, limitations upon membership to those actually and significantly involved in a fishery avoids the hazard of participation by those with little interest in the outcome of the decision-making process because they are without responsibility or concern in the interaction.<sup>16</sup>

Provisions for original and subsequent membership vary greatly among the various commissions, largely due to the historical circumstances attending their creation.<sup>17</sup> Of the commissions examined in this study, four operate solely in the North Pacific (though other groups and agreements are also involved in the area) and these four share one feature in their membership provisions that distinguishes them from the others. The fur seal, halibut, salmon, and INPFC agreements make provision only for original membership and none provide for accession by other states.<sup>18</sup> On the other hand, the tuna, ICNAF, NEAFC, and whaling agreements provide for both original members and, with somewhat different emphasis on conditions, anti-

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<sup>16</sup> Carroz and Roche in their paper on the new Atlantic Tuna Commission state that "of necessity" membership should be open to states adjacent to the area of fishery operations and cite the 1958 Convention on Fishing and Conservation of Living Resources both as express recognition of the interest of the coastal state and as entitling such states "to take part on an equal footing in any system of research and regulation for purposes of conservation in an area of the high seas adjacent to their territorial sea irrespective of whether their nationals fish there or not." Carroz & Roche, *The New International Commission for the Conservation of Atlantic Tunas in the Context of Other Intergovernmental Fishery Bodies* 40-41 (unpublished manuscript, 1966).

The statement in the text above would reject this position as a matter of policy. Furthermore, as a matter of law the 1958 Convention has no compulsive effect with respect to the very large numbers of states not parties to it, hence there would be no obligation to admit adjacent-nonfishing states to membership in a specific conservation organization.

<sup>17</sup> The historical circumstances include both traditional involvement by some states and, equally traditional, noninvolvement by others. This would help explain the distinction, noted in the text immediately below, between the Pacific agreements and the Atlantic treaties. The former, usually closed, could have rested on the assumption that no new entrants were likely in the fisheries concerned. The Atlantic agreements were concluded in light of a different background, namely one looking to largely open entry into the fishery since so many states were usually engaged in it.

<sup>18</sup> It is also true that the Fur Seal, Halibut, Salmon, and INPFC Conventions do not expressly forbid new entrants, but the failure to provide for accession by other states is probably not merely neutral in its effect. As noted in the text above, agreements dealing in part with sharing of the catch, or which obviously assume that the exploiting states are limited to a particular number, probably would need revision to accommodate new parties. It seems unlikely that the original parties' expectations included admission of new members to the group, unless the old agreement were amended.



cipate the addition of new members through time. The reasons for this difference are not difficult to discover. The first three agreements deal with a particular species and the parties thereto comprise the states directly concerned with their exploitation. The INPFC agreement is an effort to deal with the problem of a likely new entrant into the halibut, salmon, and certain other fisheries and therefore it also provides for limited membership.

On a somewhat different level, the difference in membership clauses may be associated with the different goals sought by the commissions. Thus each of the North Pacific Commissions attempts to deal, though in varying ways, with limitations on access to the resource concerned.<sup>19</sup> Efforts of this kind depend on quite specific adjustments or measures directed at states involved in concrete situations. If new entrants into the harvest come along, an entirely different set of adjustments or measures would very probably be required, calling for new negotiations. At the time these agreements were concluded the parties had to deal with the existing situation in their mutual relations and it probably would have been impossible, or at least extremely complicated, to make provision for hypothetical new entrants in the unforeseeable future.

Whatever accounts for the membership provisions in the North Pacific Commissions, it is now apparent that changes in patterns of fishing exploitation may demand a new look at the older agreements. In view of the expanded efforts by Japan and the Soviet Union to harvest other species in the treaty area, it may no longer be satisfactory to deal with conservation problems either on a species by species basis, as is now largely the case, or on the basis of agreements with limited and closed memberships. The new fisheries of the North Pacific are those developed by Japan and Russia for groundfish and the harvest only recently sought from these resources is vastly larger in terms of effort and volume than from the older salmon and halibut fisheries. Yet none of the North Pacific agreements comprehend the goal of conservation of groundfish except INPFC, which does not include the Soviet Union as a party.

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<sup>19</sup> See text at notes 97-115 *infra*. The halibut agreement between Canada and the United States does not itself deal with allocation but then this agreement does not stand by itself either in view of the North Pacific Fisheries Convention under which Japan is forbidden access to the halibut of the North American coast. In any event the expectations of the framers of the halibut agreement almost certainly did not comprehend additional entrants into the fishery nor was thought given to the situation that would have to be faced in that circumstance. At the same time, however, the Halibut Convention could very easily be amended to accommodate new

Among the other commissions some slight differences in membership provisions may be noted. There do not appear to be any technical requirements for membership in ICNAF, but it appears safe to assume that states adhering will be those, as stated in the preamble, which at least share "a substantial interest in the conservation of the fishery resources of the Northwest Atlantic Ocean. . . ." Another provision of the convention stipulates that, in general, substantial exploitation is necessary for membership on the panels which are responsible for much of the substantive work of the Commission: this suggests that membership rests on substantial interest as evidenced by substantial exploitation of particular species in the convention area.<sup>20</sup> These possible interpretations of the convention are in direct contrast to requirements of other commissions in which membership may be secured without any exploitation, as in the Whaling Commission where few members regularly take whales,<sup>21</sup> or with little exploitation, as in the case of some members of the Tuna Commission.<sup>22</sup> The NEAFC Convention also specifies no standards for membership; however, some exploitation is no doubt required as a practical matter.<sup>23</sup>

Present members in most of the commissions represent the states which engage in substantial exploitation in the areas, or for the species concerned, but usually some nonmember fishing is prosecuted, the level of intensity varying from negligible to substantial. The Halibut Commission does not include Japan which, pursuant to the INPFC agreement, is excluded from part of the halibut fishery. The Tuna Commission does not embrace Japan, although she engages in considerable tuna fishing in the convention area in ways which affect the work of the Commission. The minutes of the Tuna Commission's 1966 meeting identify several states, the most prominent being Canada, which now fish tuna in the eastern Pacific but who are not members of the Commission. Indeed, this group of states is larger than that of Commission members.<sup>24</sup>

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parties and in this sense it differs from the Fur Seal, Salmon, and North Pacific Conventions.

<sup>20</sup> This requires some qualification since Panel membership is also obtainable by contracting governments with a coastline adjacent to a subarea. ICNAF Convention, art. IV.

<sup>21</sup> Whaling Convention, art. X(2) provides that any nonsignatory government may adhere by notifying the Government of the United States.

<sup>22</sup> IATTC Convention, art. V(3) limits adherence to governments "whose nationals participate in the fisheries covered by this Convention. . . ."

<sup>23</sup> Article 15(3) states that any nonsignatory state may accede by giving notice in writing to the Government of the United Kingdom.

The new Atlantic Tuna Convention, art. XIV(1) permits adherence by any nonsignatory which is a member of the U.N. or of any U.N. specialized agency.

<sup>24</sup> IATTC, SUMMARY OF THE EIGHTEENTH ANN. MEETING 8 (1966). A recent

It does not follow from the currently representative character of some of the commissions that present institutions can cope with emerging problems. All but two of the commissions examined here, and those examined are by far the most significant, are concerned with particular species, primarily fish of high unit value. Only ICNAF and NEAFC deal with all the species of the area concerned. As fishing intensifies around the globe and in the various convention areas, the species sought are likely to be different from those now provided for; this has already occurred in the North Pacific. It is likely, therefore, that institutions with different specific interests and different memberships will be required to cope with the emerging difficulties.

One final point regarding membership that deserves separate mention is the extent to which this form of institutional cooperation has cut across the lines of current political dispute between major powers. Of the three largest multilateral commissions, ICNAF, NEAFC, and the International Whaling Commission, the Soviet Union is a member of all three and the United States of two. It is generally agreed that cooperation between these two states in fishery science projects has been effective and fruitful, although it is still not sufficiently comprehensive.

### *C. Termination of Membership*

All of the fishing conventions have provisions for renunciation or withdrawal. In four instances termination of the agreement also terminates the commission. This would obviously follow for the two bilateral commissions, the salmon and halibut, and it is also true for the INPFC<sup>25</sup> and the Fur Seal Commissions. In the case of the latter the convention contains a built-in termination date which is effective unless the parties take action to adopt a new agreement or extend the old.<sup>26</sup> The 1964 Protocol to the Fur Seal Convention extended the life of the arrangement for another six years. In addition any party may act to terminate the Fur Seal Commission if it believes the convention

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report states that in November, 1966, Soviet trawlers left their Far Eastern ports for fishing off Mexico Baja California where they, and vessels to come later, are expected to fish for anchovy, sardine, bluefin tuna, and mackerel. Bureau of Commercial Fisheries, Fishery Products Rep. No. 0-239 (Market News Service, Dec. 9, 1966).

<sup>25</sup> It is of some importance to note that the North Pacific agreement, concluded in 1953, was to continue for 10 years and thereafter for one year after a party gives notice of termination. Article XI(2). The Commission is thus maintained now on a year-to-year basis and periodic negotiations are underway regarding treaty revision. This circumstance is often thought to be responsible for the 1963 decision of the Commission to remove halibut in the East Bering Sea from the Annex to the Convention, thereby opening the area to Japanese fishing.

<sup>26</sup> Article XIII(4).

obligations are not being observed by the other parties and members are unable to agree upon the need for and nature of remedial measures.<sup>27</sup> It seems reasonably clear that under these circumstances, where the commission has no existence except at the will of an individual member, the body is more an extension of the members than an independent international organization. At the same time the persons who serve on these commissions are not merely handmaidens for other national policy makers. The commissions serve, at least in part, as a separate arena in which the members may work out their interrelationships with respect to certain specific problems. It is because each commission is in some respects a separate arena, with capacity to make or influence national decisions regarding fisheries, that they merit study as embryonic international organizations.

The Whaling, NEAFC, ICNAF, and Tuna Conventions also contain provisions for renunciation or withdrawal, but the commissions survive any individual action by a party.<sup>28</sup> Since in most instances any action by the commission must be accepted by each member before the action becomes effective as to it, there would seem to be no need for renunciation or withdrawal in order to avoid substantive obligations. Withdrawals have occurred only from the Whaling Commission and this stemmed, in the more important instances, from the periodic inability of the various whaling states to reach agreement, independently of the Commission concerning the national quotas.

None of the conventions provide for expulsion or suspension of a member, though it may be noted that membership on a panel within ICNAF may be dependent upon payment of the financial obligations assessed by the Commission.<sup>29</sup> It is also possible that this internal membership may be altered if a state's fishing operations shift to another region within ICNAF or out of the convention area entirely.

## II. STRUCTURE OF ORGANIZATION

The more general policies to be pursued in arranging the institutional structure of international organizations are sometimes identified in terms of efficiency and flexibility. Efficiency is sought by devising

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<sup>27</sup> Article XII.

<sup>28</sup> Whaling Convention, art. XI; NEAFC Convention, art. 17; Northwest Atlantic Fisheries Convention, art. XVI; IATTC Convention, art. V.

<sup>29</sup> At one stage Italy withdrew from Panels 1-4 of the Northwest Atlantic Commission, apparently because of failure to pay financial obligations. See text at note 83 *infra*. The new Atlantic Tuna Convention makes express provision for this by suspending voting rights when a member's contributions fall in arrears for two years or more. Article X.

a structure that permits ready use of the personnel and facilities available to achieve the goals of the organization. Flexibility in terms of structure embraces not only the capacity of the organization to cope with its usual tasks, but also the capacity to adapt to unanticipated requirements and situations. It is very difficult to discuss in the abstract the task of implementing these criteria; hence policy considerations are mentioned hereafter in connection with specific components of the organizational structures of the commissions.

The internal decision-making structures of the various commissions exhibit both close similarities and great differences. In all cases the ultimate responsibility for exercising the most important powers conferred upon the organization rests with a commission, but the composition, scope of authority and procedure of each commission differ in a variety of ways. Typically the commission is composed of a certain number of representatives from each state with whom are associated a group, varying in size, of experts and advisers.

The most common characteristic of the various convention provisions concerning the main body of the organization is the brevity and lack of detail regarding its establishment. Except for the salmon agreement, the treaties rarely go beyond specifying the number of commissioners to be appointed by each member, leaving all other matters, such as the appointing power, tenure, remuneration, and qualifications to the members.<sup>30</sup> This means that each party is afforded complete discretion in these matters and that a very great variety of practices can be adopted by the members. On balance the organizational discretion left to individual states is desirable. The effectiveness of the organization in terms of acceptance of its recommendations may depend upon the influence of the commissioners within their appointing states. From a somewhat different perspective, members may have internal political problems which can be alleviated by astute exercise of the appointing power. And, finally, overly precise specification of commissioner qualifications in the basic charter may later prove to be unduly hampering as experience discloses the need for new types of skills and talents. The commissioners are not, in any case, the only delegates representing members at meetings of the organization, by treaty or by practice; as noted above, experts and advisers also commonly participate.

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<sup>30</sup> Article II of the Salmon Treaty provides for both method of appointment and of tenure.

In the United States, the method of appointment to the various commissions exhibits an effort to provide for participation both by persons from the particular states involved in fisheries and occasionally from the industry especially concerned and by government officers officially involved with fishery resource problems. In two instances the legislation implementing the treaties contains provision for the appointment of commissioners. The Tuna Conventions Act of 1950 provides that of the four commissioners for the Inter-American Tropical Tuna Commission:<sup>31</sup>

- (a) Not more than one shall be a person residing elsewhere than in a state whose vessels maintain a substantial fishery in the area of the conventions;
- (b) at least one of the Commissioners who are such legal residents shall be a person chosen from the public at large, and who is not a salaried employee of a state or of the Federal Government;
- (c) at least one shall be an officer of the United States Fish and Wildlife Service.

At the time of this writing the United States is represented by three commissioners: two apparently appointed pursuant to section (b), both being lawyers from the State of California, and one appointed under section (c). The North Pacific Fisheries Commission is to consist of four commissioners from each member. Of the United States Commissioners:<sup>32</sup>

- (a) one shall be an official of the United States Government; and
- (b) each of the others shall be a person residing in a State or Territory, the residents of which maintain a substantial fishery in the Convention area.

Somewhat similar practices have prevailed with respect to the Halibut and Salmon Commissioners although neither the treaties nor implementing legislation so provide. Professor Swygard reports that for both Commissions it was understood that the United States Commissioner of Fisheries (now Fish and Wildlife Commissioner) would be appointed.<sup>33</sup> The remaining Halibut Commissioners would come from the west coast and the Salmon Commissioners from the State of Washington.

In the case of ICNAF, the United States Commissioners, of whom

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<sup>31</sup> 16 U.S.C. § 952 (1964).

<sup>32</sup> 16 U.S.C. § 1022 (1964).

<sup>33</sup> Swygard, *supra* note 8, at 142-46 sets out the political background for these decisions.

there can be three, have uniformly consisted of a representative of the Fish and Wildlife Service, a representative from the Massachusetts or Maine state fishery departments, and a third representing the east coast fishing industry.

Though in certain instances the identity of the commissioners may be crucial, provision for the employment of experts and advisers either formally in the commissions or in practice, reduces their importance. The experts and advisers are not authorized to vote in commission deliberations of course, but in the nature of the rather widescale investigative enterprise, comprising much of the commissions' functions, it is inevitable they play an influential role in the basic work of the group. This is not to say, of course, that experts and advisers determine commission decisions, but they do influence them heavily.

#### *A. Officers of Commissions*

Most, but not all, the treaties call for the electing of officers from among commission members appointed by the various governments. Neither the halibut nor salmon agreements so provide, but in practice, under the rules established by the commissions, a chairman and vice-chairman are selected. Apparently, in the Salmon Commission, as in other cases, the officers alternate between the states concerned.<sup>34</sup> The reason for the uncertainty implied by the term "apparently" is that in this instance, as in many others, the Reports of the Salmon Commission are near perfect models of brevity. Although frequently the reports make no reference to the identity of the officers, it is assumed that the principle of alternating nationalities is followed here too. (The Commission rules of procedure do not seem to be available to the public.<sup>35</sup>)

NEAFC has a unique arrangement. The treaty provides that the President and two Vice Presidents need not be chosen from either the commissioners or from their experts or advisers. Moreover, if the President is chosen from a delegation "he shall forthwith cease to act as a member of that Delegation, and if a Commissioner has been elected the State concerned shall have the right to appoint another person to serve in his place."<sup>36</sup>

As will be seen below, the officers of the various commissions are not in pivotal positions, but they do on occasion have certain special competences.

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<sup>34</sup> *Id.* at 165.

<sup>35</sup> The annual reports do not include the text of the rules. Possibly the rules are one of the details of operation, referred to in note 5 *supra*, about which information must be sought directly from the member governments.

<sup>36</sup> NEAFC Convention, art. 3(3).

### B. Committees

It would be exceedingly tedious, and just as unrewarding, to enter into detailed discussion of the employment of committees by the commissions. Committees are, no doubt, not of equal use to the various commissions, and are not of particular importance to the Tuna, Salmon, and Halibut Commissions which have a permanent staff. For the commissions without staffs there are, of course, no continuing organs within the structure of the groups which can pursue the complex problems of research and investigation either of which is the main purpose of the organization or provides the basis for its work. It is understandable then that there is a proliferation of committees, working groups, special assemblies of scientists, and so on, through which the members plan research programs, analyze results, formulate reports, and devise recommendations. In addition, the rather awesome scale of scientific work required of some commissions, such as INPFC and ICNAF, makes it imperative that a large number of people be engaged, with qualifications much more diverse than those the commissioners possess. For most of the commissions, moreover, it is likely that the task of most, but not all, committees is essentially scientific in nature. The most notable exception is INPFC. Here the problems faced by the Commission are, or at least have been made to be, heavily tinged with political considerations, being concerned not only with the gathering and examination of data for the purpose of identifying physical conditions in the fishery, but also with decisions about who gets access to what resource.<sup>37</sup>

The makeup and use of the committee device in the commissions are observably influenced by the task assigned to the committees. For example, the ICNAF agreement projects two basic standing committees for conducting its business, a Finance and Administration Committee and a Research and Statistics Committee. But provisions for membership differ. For the former, each government is represented by a commissioner who may be assisted by experts and advisers.<sup>38</sup> The latter committee is composed of a nominee from each government, not necessarily a commissioner, who is assisted by experts and advisers and by observers from noncontracting governments and from FAO and ICES.<sup>39</sup> The reason for the difference in composition lies, in all probability, in the distinct functions served. Finance and Administration is

<sup>37</sup> See text at notes 175-76 *infra*.

<sup>38</sup> Rules of Procedure for the Commission, Rule 16(b), ICNAF HANDBOOK 43-44 (1965).

<sup>39</sup> Rule 23(c), *id.* at 44.



concerned with the internal problems of the Commission, whereas Research and Statistics deals with substantive problems regarding research in the convention area. For the Research and Statistics Committee, then, more effective operation calls for drawing upon all those who may be concerned with the area, and who might contribute, whether they are from a nonmember state or from another international organization with similar responsibilities in the same area.

When the focus or emphasis of a committee's work has a substantial political content it is to be expected that those with ultimate authority on the commission will play a major role. This may be illustrated by the makeup of the two committees established by INPFC to deal with issues posed in its basic charter. The Ad Hoc Committee on the Protocol, concerned with shifting the line which determines the area of Japanese abstention from high seas fishing for salmon, was given the task of considering "application of the results of research to adjustments of the provisional lines in accordance with the terms of the Protocol."<sup>40</sup> It is entirely clear from the annual reports that the task of this committee was conceived to be delicate, at least in the initial stages of its work. The committee was to consist of one member from each section assisted by experts or advisers, but "with the understanding that the group shall be kept small."<sup>41</sup> More significantly it was explicitly provided that "Records shall be kept and distributed on a confidential basis."<sup>42</sup> After the committee met during the 1958 annual meeting, its report to the Commission "was dealt with...on an *in camera* basis and its contents have not been given general distribution."<sup>43</sup> In this context it merits notice that both the United States and Canada always had two commissioners designated as participants in this committee, one listed as "commissioner-adviser," while Japan placed all four commissioners on it, using the "commissioner-adviser" designation for three of them.<sup>44</sup>

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<sup>40</sup> 1958 INPFC ANN. REP. 8. The terms of reference adopted at the 1958 meeting included the following:

The Committee shall study and consider the results of scientific investigations referred to it by the Commission for the purpose of recommending to the Commission, as expeditiously as practicable, what action, if any, may be desirable or necessary for the discharge of the responsibilities set forth in the Protocol.

*Id.* at 9.

<sup>41</sup> *Id.* at 8.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.* at 9.

<sup>44</sup> See e.g., 1960 INPFC ANN. REP. 17. In 1959 the Commission noted that it was unable to reach agreement on what the Protocol to the Convention meant in its instructions as to how the intermingling salmon stocks of the North Pacific

The Ad Hoc Committee on Abstention also had a major political role to fulfill, and all three states made intensive use of the "commissioner-adviser" category, reaching a high point in 1964 when each party placed all four commissioners on this committee.<sup>45</sup> This experience is in direct contrast to the pattern of membership in the Standing Committee on Biology and Research where very seldom is more than one commissioner a member of the committee. The point to be noticed is that, in major part, the Commission did not wish to delegate any responsibility to a subsidiary committee composed substantially of experts or advisers, who may be scientists and have a particular orientation because of that fact. Instead the Commission converted the ad hoc committee deliberations into virtually a regular Commission meeting.<sup>46</sup> It is perhaps reasonable to speculate that this practice appeared desirable when the issues involved the "interpretation" of research results for the purpose of implementing fundamental provisions in the original treaty, provisions that were heavily tinged from the beginning with sensitive political considerations, and that such "interpretations" were deeply influenced by political factors including the expediency, timing, form and detailed content of the decisions to be made.

### C. Staff

By far the major organizational difference among the commissions is the existence of a permanent staff in three of the species organizations in contrast to the wholly decentralized research work in all of the others. In accounting for this it would be ingenuous to deny that in the Salmon, Halibut, and Tuna Commissions the United States plays a major, but not dominant, role<sup>47</sup> and that in two cases there was a

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Ocean should be divided. Therefore, during the Sixth Annual Meeting on November 7, 1959, the members of the Commission agreed to inform the Contracting Parties that they had been unable to arrive at an agreed interpretation of the intent of the Protocol to the Convention. They requested the Contracting Parties to provide them with a single agreed interpretation as soon as practicable. No such interpretation has come forth.

1964 INPFC ANN. REP. 4. In view of the negotiations over revision of the basic treaty it is doubtful if any such interpretation can be expected except in that context.

<sup>45</sup> 1964 INPFC ANN. REP. 21. Under art. III(1)(a) the Commission shall "in regard to any stock of fish specified in the Annex, study for the purpose of determining annually whether such stock continues to qualify for abstention under the provisions of Article IV." The Ad Hoc Committee was established to assist in implementation of this Commission function by making recommendations to it regarding these annual determinations. 1958 INPFC ANN. REP. 11.

<sup>46</sup> It is relevant to note in this connection that the Commission itself is not composed wholly of scientists or even in substantial part. The U.S. Commissioners in 1965, for example, included two lawyers, a college president, and one federal fisheries official.

<sup>47</sup> In the first two cases the United States and Canada are equal parties, including the sharing of costs, while in the Tuna Commission the United States pays much

widespread, if slowly developed, consensus among those concerned on the need for action. Perhaps of even more importance, neither the salmon nor the halibut agreements explicitly provide for employment of a permanent staff, suggesting that the appropriate approach was left to local decision, in which local interests played a determinative role in deciding to use this device. It is doubtful if this can be said of the Tuna Commission except in the sense that it was felt to be in the interest of the United States, Costa Rica, and any other Latin American state which might become a member, to rely upon a genuine international body for scientific research rather than upon one responsible only to the United States. For in direct contrast to the situation pertaining in the salmon and halibut fisheries, in this instance, only the United States could conduct research if such work was left to each member to perform. At that time there simply were few if any trained marine scientists in the other American nations concerned with the eastern tropical tuna and bait fishes and it would have been hypocrisy to conclude a treaty which depended upon research by national agencies. In this instance, then, the notion of an international staff includes even an element of international education as well as the more substantive preference for objective scientific investigation. It may be noted, incidentally, that this feature of the Tuna Commission staff has been executed on a truly grand scale; staff members are recruited from around the globe, thus facilitating the spread of sophisticated marine biologists to places needing such highly trained specialists.

Whatever the motivating factor<sup>48</sup> it is surely significant that permanent staffs are utilized in what are, or were in the beginning, essentially very limited regional agreements among states with a clearly identifiable common interest in an easily identifiable fishery. If any two states in the world could mutually repose confidence in an international staff they are the United States and Canada. This is not to suggest that agreement in the Halibut and Salmon Commissions is necessarily easy to achieve, but the fact is that these two states have so many general common interests, in addition to their shared concern over a specific resource, that it was not surprising they were able to concur in creating an international staff with the responsibility of dealing with rather specific and limited scientific and engineering

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the largest share of the budget since the formula for determining contributions refers to payment based on the proportion of the total catch utilized by each party.

<sup>48</sup> It may be important to inquire concerning the expected impact of Commission decisions on access to the fishery and on revenue therefrom since this expectation

problems. Of course, even here the staff does not command—each government retains ultimate control over commission actions. Nonetheless, staff recommendations are probably given heavy, if not decisive, weight in determining commission actions; this situation alone would normally impede even the delegation of specific scientific tasks to the group because it is not wholly under exclusive national control.

Other considerations regarding these specialized situations also suggest that prospects for centralizing research responsibilities in future commissions may not be promising. In the case of both the Halibut and Salmon Commissions it was firmly believed, on all sides, that certain definite actions were required if the fisheries were to be rebuilt and maintained. Recognition in the halibut industry of the need for rather drastic measures was built up over a very considerable period of time and the Commission's authority to take measures was only gradually expanded.<sup>49</sup> The Commission was authorized, and expected to exercise, detailed regulatory power which required for efficient execution a rather tight administrative setup, including staff. If anything, the Salmon Commission exemplifies this set of circumstances in even more drastic form.<sup>50</sup> Before the Commission could take any action, it was to be preceded by eight years of study. And when the requirements for action were ascertained, it was clear that very detailed supervision of the fishery was required. In neither case was it feasible to rely upon wholly independent research efforts, with the necessity for coordination and, possibly, for eventually negotiated agreement on findings. In contrast to other commissions, for whom an annual meeting is usually sufficient, the Salmon Commission must convene frequently and during the season may meet more than once a week. Without a staff organization a commission with such immediate responsibilities would find it extremely difficult to operate effectively.

Although neither the Salmon nor Halibut Commissions make explicit provisions for a staff, the context in which these groups were created suggests that use of a scientific staff was implicit in the new international arrangements. Both agreements were successfully concluded only after years, or decades, of agitation, recrimination, and political

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may affect the initial choice of whether to establish an independent staff. It may be hypothesized that the lesser the impact expected the more likely the parties' willingness to concur in the creation of an independent staff. Whether or not this factor is operative and the degree of its importance, would require more intensive analysis than assayed in this paper. Financial considerations are, it is clear, one of the significant influences bearing on the choice not to create an independent staff.

<sup>49</sup> Swygard, *supra* note 8, at 97-107.

<sup>50</sup> *Id.* at 107-35.

maneuvering, although it was widely recognized that action based upon scientific investigations to be conducted by the commissions was vitally necessary. This is especially notable in the case of the Salmon Commission. It is hardly conceivable that the expectations of the treaty framers, let alone of the groups most immediately affected, could have been satisfied without the work of a full-time professional staff.

The professional staff of the Tuna Commission stands in contrast to those previously mentioned precisely because of the need for regulatory measures to be clarified. It was thought wise to achieve clarification by creating an international staff to undertake the necessary work. The important factor here appears to center on the political context, especially the traditional relations between the United States and its neighbors to the south. Removing the research arm of the Commission from any national affiliation was, in such a context, a requirement of effective action, whatever the action turned out to be.

The importance of the above considerations was sufficient to overcome the reluctance of national officials to establish a research agency which is not only beyond national control but which may divert financial resources from agencies which are subject to such control. Apparently such considerations are seldom encountered and it is difficult to discern any current desire on the part of national fishery officials to establish international and independent fishing research agencies. The latest international commission, that on Atlantic tuna, makes no provision for a staff despite the fact that the IATTC is an outstanding illustration of the value of such an arrangement.

#### *D. Advisory Committees*

Several of the fishery commissions employ advisory groups as part of their total structure, pursuant either to direct provision in the basic charter or to decision by the commission. This use of advisory bodies composed of persons drawn from the various segments in the industry is an obvious recognition of the political problems involved in achieving effective implementation of commission objectives.<sup>51</sup> The actions of the two earliest commissions testify to the very practical considerations confronted. Although the 1931 Halibut Treaty did not mention advisory groups, it is reported by Professor Swygard that "the first act

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<sup>51</sup> There is also, apparently, realization of the value of the advisory committee device as a means of enlisting cooperation from the industry in carrying out the work of the Commission. Such assistance may be most helpful, for example, in persuading vessel owners and crews to take action which facilitates performance of the Commission's tasks.

of the Halibut Commission under the 1931 Treaty was the establishment of a Conference Board appointed from the fleet."<sup>52</sup> The functions served by the board were summarized by the Halibut Commission Chairman as follows:<sup>53</sup>

to provide information which the commission may require, other than that it shall itself gather; aid in the formulation and application of regulations; discuss the facts and reasoning upon which regulations are based, and communicate same to the members of their associations. The board is to meet in its entirety or in sections with the commission or its director of investigations at such times as may be desired; formal meetings to be held during the winter slack season.

The annual reports of the Halibut Commission do not offer a detailed picture of its relationship with the Board, leaving little basis for observation from this viewpoint, but it seems fairly evident that through the Board major segments of the industry have had full opportunity to make known their views regarding appropriate regulations and to advance recommendations. Some interested groups may not be on the Board at all and others may not be represented accurately. In 1949 the Board, according to the Commission, gave "considerable support" to a Commission proposed method for splitting the fishing season into a number of successive open and closed periods.<sup>54</sup> However, when the matter was "referred to the various fleets and to other interested parties for further consideration," so much opposition was discovered that the Commission deferred action.<sup>55</sup>

The salmon convention itself did not mention an advisory group but

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<sup>52</sup> Swygard, *supra* note 8, at 187.

<sup>53</sup> *Id.* at 188

<sup>54</sup> 1949 IPHC ANN. REP. 9.

<sup>55</sup> *Id.* Public hearings were held at the end of the fishing season and the Commission's report states that vessel owners, fishermen, and most halibut dealers favored splitting the season. "However, the particular split season proposal developed at the January meeting of the Conference Board, involving a succession of open and closed periods applied simultaneously to all boats, received little support from fishermen, vessel owners or dealers in all ports." *Id.*

The extent of the Commission's relations with industry groups is evident from the following which appears in 1953 IPHC ANN. REP. at 9-10:

During the morning of January 21, the results of investigations conducted during 1952 and the statistics of the fishery and the effectiveness of regulation in 1952 were reviewed. In the afternoon, representatives of the Washington State otter trawlers and of a liver processor were heard on matters relative to their interest in the fishery. Thereafter, the status of current appropriations and plans for investigations in 1953 were presented by the staff to the Commission and discussed.

On the second day, January 22, the Commission held a joint meeting with representatives of fleets and dealers and reviewed the previous season's fishing and the results of investigations. In the afternoon, one meeting was held with representatives of the Pacific coast halibut dealers and another with the fleet's

the United States Senate in consenting to ratification attached (on the insistence of the Governor of the State of Washington)<sup>56</sup> a reservation requiring the Commission to establish such a body. Described as an "understanding" and embodied in the Protocol of Exchange, the reservation stated:<sup>57</sup>

That the Commission shall set up an Advisory Committee composed of six persons from each country who shall be representatives of the various branches of the industry . . . [purse seine, gill net, troll, sport fishing, and one other], which Advisory Committee shall be invited to all non-executive meetings of the Commission and shall be given full opportunity to examine and to be heard on all proposed orders, regulations or recommendations.

The annual reports indicate that this understanding has been fully implemented, for the committee appears to have very close contact with the Commission.<sup>58</sup> Indeed the intimacy of the consultation between these groups, the regulators and the regulated, might in other settings raise questions about the propriety of the arrangement.<sup>59</sup> Be this as it may, the point to be emphasized here is that in the intensely political context in which the salmon and halibut agreements were evolved the desirability of adopting the advisory group device can hardly be questioned, especially since both commissions came to possess very considerable effective regulatory power over the fisheries.<sup>60</sup>

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representatives to receive and discuss recommendations for the regulation of the fishery in 1953.

On January 23, the Commission considered the industry's proposals, agreed upon the regulations to be recommended to the two governments for 1953 and made other administrative decisions.

<sup>56</sup> Swygard, *supra* note 8, at 130-31.

<sup>57</sup> Article V of the 1957 Pink Salmon Protocol, amending the 1930 Convention, enlarged the Advisory Committee to six members.

<sup>58</sup> The following account, which appears in 1960 IPSFC ANN. REP. 4, is representative:

The tentative recommendations for regulatory control of the sockeye and pink salmon fishery in Convention waters, as submitted to the Advisory Committee on December 11, 1959, were discussed and certain revisions made on the basis of the presentations of the Committee. The revised regulations recommended for the 1960 sockeye and pink salmon fishery in Convention waters were approved in part with the daily opening and closing times for Canadian purse seine and gill net fishing in Juan de Fuca Strait being held in abeyance subject to further recommendations by the Advisory Committee.

The first sentence above is apparently a standard description and is commonly found in the annual reports.

<sup>59</sup> Perhaps this needs emphasis. The point is that there are frequently, in other contexts, conflicts between the interests of the regulated groups and the public interest, including the interest of the consumer and that an explicit method for protecting this larger interest often is desirable.

<sup>60</sup> However, in 1953 IPSFC ANN. REP. 6, the Salmon Commission calls attention to its reluctance to exercise the power conferred in the 1937 agreement:

National sovereignty has not been encroached upon. In fact the Commission has refrained from making regulations in Convention waters except on the High

The ICNAF, INPFC, and tuna agreements all contain provision for an advisory group and so far as the United States is concerned the implementing legislation prescribes for various details, including the general criteria for appointment, terms of office, and privileges.<sup>61</sup> The advisory groups in these instances differ, however, from those for the Salmon and Halibut Commissions in that the latter are composed of representatives of the industry from both parties. The former agreements envisage not one advisory group drawn from the various parties but a separate body from each state, or national section with each national section having an advisory body composed of its own nationals. The historical background of the Salmon and Halibut Commissions and the interrelationship of an international industry fishing the same resource in the same area no doubt offers explanation for this evolution.

The significance of the advisory group device in the practice of ICNAF, INPFC, and IATTC is difficult to assess from the reports of these bodies, but it probably differs from one to another and perhaps from time to time within any one group. In addition the annual reports do not clearly indicate how many states in these groups have actually appointed advisory committees. The United States has appointed a committee for all three but Canada appears to have a committee for only ICNAF and not for INPFC.<sup>62</sup> So far as the other states are concerned, and also in relation to the United States practice, it should be emphasized that in most instances the fishery commission agreements, or rules of procedure adopted by the commission, provide another method for assuring that the various interested segments of the fishing industry are apprised of, and enabled to play a part in, the

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Seas where control is not possible except by such regulations. Regulation has been accomplished during the past eight years through the process of recommending regulations to the respective governments. When the recommendations are accepted the regulations become of national concern and bear the approval of each respective government representing its respective nationals. In this way the *recommendations for regulation* are a matter of international as well as national concern but the *actual regulations* are of national concern only because they are made as well as enforced by the individual governments. In this way national sovereignty has been maintained beyond the specifications of the Convention.

The 1957 Protocol, in art. III, limits even the formal regulatory authority of the Commission.

<sup>61</sup> Northwest Atlantic Fisheries Act of 1950, 16 U.S.C. § 983 (1964); North Pacific Fisheries Act of 1954, 16 U.S.C. § 1023 (1964); Tuna Convention Act of 1950, 16 U.S.C. § 953 (1964).

<sup>62</sup> Apparently the reason for this lies in the internal political situation. Japan also names an advisory committee for its section of the North Pacific Commission. However, the Japanese advisory group is not formally organized.



developments within the commission. Three of the treaties, ICNAF, NEAFC, and the International Whaling Convention, directly anticipate participation of advisers and experts, accompanying the commissioners,<sup>63</sup> while the North Pacific Commission provides for advisers and experts in its rules of procedure<sup>64</sup> and the Tuna Commission in practice permits advisers, experts and observers to attend meetings.<sup>65</sup> The Halibut and Salmon Commission reports refer to meetings held in conjunction with their advisory committees and also with large numbers of interested industry people,<sup>66</sup> but it is impossible from the reports to discover whether other advisers or experts are present at executive sessions or at less public gatherings.<sup>67</sup> Neither of the commissions publishes a roster of participants at regular meetings although the Salmon Commission lists members of the advisory committee.

The device of placing industry members as advisers seems to be most frequently used by the United States and Canada in ICNAF. According to the treaty, representatives of the advisory committees may, with the consent of the appointing government, attend, as observers, nonexecutive meetings of the Commission or of any panel in which their government participates.<sup>68</sup> The reports do not indicate that either the American or Canadian committees are inclined to take advantage of this provision though infrequently they are listed as "observers." These committee members do frequently attend meetings, however, as advisers, possibly because of the distinction between "observer" and "advisers" in Commission rules. The classification of a person as "observer" or "adviser" does not have any discernible effect upon the scope of his participation in Commission meetings, since in either case he is only permitted to speak. But apparently the designation may affect which meeting a person is entitled to attend. Advisory committee members are restricted in attendance, as a matter of right, to nonexecutive Commission and panel sessions, while "advisers" and "assistant advisers" do not appear to be so confined.<sup>69</sup> Despite this rather amorphous practice the ICNAF annual reports indicate that in

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<sup>63</sup> ICNAF Convention, art. II(2); NEAFC Convention, art. 3(2); Whaling Convention, art. III(1).

<sup>64</sup> Rules of Procedure for the Commission, Rule 6, INPFC HANDBOOK 30.

<sup>65</sup> See generally the mimeographed summary minutes of the annual meetings which list the experts and advisers in attendance.

<sup>66</sup> See notes 54 and 57 *supra*.

<sup>67</sup> The fair implication of the language in the reports is that outsiders attend only those meetings designated as open to them.

<sup>68</sup> ICNAF Convention, art. V(1).

<sup>69</sup> There is nothing in the treaty on this.

one instance, the United States Advisory Committee was responsible for presentation of a recommendation to a panel.<sup>70</sup>

In INPFC the role of the advisory committee in one particular instance assumed some political significance, indicating (somewhat weakly) the usefulness of the device. When the decision of the Commission was made to recommend removal of the halibut stocks of the East Bering Sea from the annex of the treaty,<sup>71</sup> with the object of freeing the Japanese from their obligation to abstain from fishing this species in this area, the not unexpected result was a furor in the halibut fishing industry. It was no surprise, further, that for a number of reasons the reverberations extended to Washington, inspiring hearings by the Senate Committee on Commerce, jointly with the House Committee on Merchant Marine and Fisheries, to consider this recommendation.<sup>72</sup> In the course of the hearing, statements were made that the Commission decision came as a great surprise both to Congress and to the fishing industry.<sup>73</sup> Perhaps it did. If so, the blame could hardly be placed upon the Commission, for testimony in the hearings, by commissioners and by members of the advisory committee, made it completely clear that the advisory committee had conferred with the Commission several times and at length regarding this particular problem<sup>74</sup> and made a recommendation from which but three members dissented. Although these facts came out in the hearing, they were somewhat muted by the loud charge of secrecy and undue haste asserted

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<sup>70</sup> ICNAF, REP. OF FIRST ANN. MEETING 7 (1951).

<sup>71</sup> The Annex provides, in relevant part, as follows:

1. With regard to the stocks of fish named below, Japan agrees to abstain from fishing, and Canada and the United States of America agree to continue to carry out necessary conservation measures, in accordance with the provisions of Article V, Section 2 of this Convention:

(a) Halibut (*Hippoglossus stenolepis*)

The Convention area off the coasts of Canada and the United States of America in which commercial fishing for halibut is being or can be prosecuted. Halibut referred to herein shall be those originating along the coasts of North America.

<sup>72</sup> *Joint Hearings on the East Bering Sea Halibut Fishery Before the Merchant Marine and Fisheries Subcommittee of the Senate Committee on Commerce and the House Committee on Merchant Marine and Fisheries*, 88th Cong., 1st Sess. (1963) [hereinafter cited as *Hearings*].

<sup>73</sup> *Id.* at 2, 10 (Senator Magnuson), 74-75 (Mr. John Wedin), 80-81 (Senator Magnuson).

<sup>74</sup> *Id.* at 16, 21 (Mr. Edward Allen, Commissioner), 45 (George Johansen, Secretary-Treasurer, Alaska Fishermen's Union, Member of the Advisory Committee), 134 (Mr. Harold Lokken, Manager, Fishing Vessel Owners Association, Member of the Advisory Committee).

It is difficult to capture the flavor of these hearings in a few words. Suffice to say that statements in support of the Commission's procedure are lost in the mass of unfavorable comment. The same may be said for the facts about relations between the Commission and its advisory committee in this particular instance.

against the Commission. This relative lack of emphasis on the facts of consultation and thorough use of the mechanism established for the purpose perhaps is seen in better perspective in light of the following circumstance: two members of the advisory committee testified and mentioned, very briefly, their participation in committee meetings on the issue and one of them, Mr. Harold E. Lokker, was the manager of the Fishing Vessels Owners Association which, he stated, "has been in . . . the halibut business, since 1914."<sup>75</sup> Seemingly, one might fairly conclude, it was just as well, from the viewpoint of all concerned, not to ventilate matters too thoroughly. In short, in this instance at least, the advisory committee served a useful dual function: It (1) insulated the Commission from premature industry pressure and (2) established for the record that a definite consultative procedure had been fully and faithfully employed. Despite the political rhetoric in the hearings the latter was made convincingly apparent. If the fishery commissions of the future more frequently engage in decision-making with political repercussions, this experience should convey some very useful, if subtle, lessons.

#### *E. Decentralization of Functions*

As fishing practices expand around the world and change with innovations in boats, gear, and processing operations, efforts at community regulation may similarly expand and change. As new or transformed international regulatory mechanisms are created, one emphasis may be upon regional groupings designed to cope with fishery problems in large ocean areas encompassing multinational exploitation of many different stocks of fish. In this context it may be desirable to provide mechanisms for decentralizing activities within a particular organization so that the problems unique to a particular subarea may be resolved most efficiently yet as part of the entire context.<sup>76</sup> Existing methods for such decentralization could serve as guides for these possible developments.

A major structural element in two commissions, ICNAF and NEAFC, and an innovation in conservation regimes, is the establishment of subsidiary bodies with certain responsibilities regarding the fisheries in identifiable portions, or subareas, of the entire convention area. For example, the ICNAF Convention defines a precise boundary

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<sup>75</sup> *Id.* at 129.

<sup>76</sup> It is not only in this context that methods of decentralization could be useful. The Atlantic Tuna Convention, concluded in May, 1966, is concerned solely with tuna and tuna-like fishes but in article VI the Commission is authorized to "establish Panels on the basis of species, group of species, or of geographic areas."

for the area to which it applies<sup>77</sup> and also, in an annex, subdivides this area into five subareas for which panels are to be established by the contracting governments.<sup>78</sup> The initial composition of each panel is specified in the annex. The convention stipulates that after two years the Commission is to make an annual review of panel representation and "shall have the power, in consultation with the panel concerned, to determine representation on each panel . . ."<sup>79</sup> Representation is determined by (1) current substantial exploitation in the subarea concerned of fishes of the cod group, of flat-fishes, and of rosefish, and (2) whether a contracting government has a coastline adjacent to a subarea. In practice the Commission does review panel composition annually and on occasion it has exercised its authority. At its fifth annual meeting the Commission requested its Executive Secretary "to submit to the Iceland Government the Commission's wish that Iceland, playing a considerable role in the fishery and research work in subarea 1, take membership in Panel 1."<sup>80</sup> Iceland had ratified the convention prior to the first meeting of the Commission and therefore had a right to membership from that time, but it had not sought panel membership until this expression of the Commission's desires. At the next annual meeting, the sixth, Iceland applied, and was accepted, for membership in Panel 1.<sup>81</sup> At the same meeting the United Kingdom applied for membership on Panel 4, but after discussion withdrew its application "in view of the lack of substantial exploitation."<sup>82</sup> Certain questions arose later about Italian compliance with its financial obligations to the organization and in 1959 after several years membership on Panels 1-4, Italy withdrew from all panels.<sup>83</sup> In 1960-1961 Italy was again represented on Panels 3 and 4.

The panels were apparently regarded as so important an element of the ICNAF structure that special rules of procedure were provided for them.<sup>84</sup> Each panel is authorized, in accordance with convention article IV, to adopt its own rules of procedure and, indeed, the United

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<sup>77</sup> Article I defines the convention area, which excludes territorial waters, in terms of degrees and minutes of longitude and latitude.

<sup>78</sup> The subareas are also defined with precision. Although not provided for in the treaty, each subarea is further subdivided for statistical purposes.

<sup>79</sup> Article IX(2).

<sup>80</sup> [1954-1955] ICNAF ANN. REP. 10.

<sup>81</sup> [1955-1956] *id.* at 9.

<sup>82</sup> *Id.* at 14.

<sup>83</sup> The administrative report for the year ending June 30, 1958 shows Italy in arrears in the sum of \$10,961.42, representing two years' contribution. [1957-1957] *id.* at 9. This increased to \$16,751.11 a year later and at the 9th annual meeting the reported Panel memberships do not include Italy. [1958-1959] *id.* at 11.

<sup>84</sup> ICNAF HANDBOOK at 47.

States advised the Commission that it had no authority to promulgate panel rules.<sup>85</sup> As it turned out the Commission recommended uniform rules spelling out the basic structure and method of functioning for the panels and these were approved by all five panels.<sup>86</sup>

In addition to government representation on the panel by commissioners assisted by experts or advisers, the panel rules provide that the advisory committees, which each government is entitled to appoint, may be represented by "observers" at certain panel meetings, namely the "nonexecutive" meetings.<sup>87</sup> The presence of these observers is conditioned upon the assent of the contracting government concerned and upon notice to the Executive Secretary by the commissioners of the names of advisory committee members authorized to attend the panel meetings.<sup>88</sup> That advisory committees may have definite impact on panel work is evident from the first report of the Commission which records that Panel 4 received a recommendation from the United States Commissioners "on behalf of their Advisory Committee."<sup>89</sup>

Each panel elects a chairman for a term of two years. Under the rules the chairman may be re-elected but not for successive terms. Should the chairmanship become vacant a replacement is elected at the next panel meeting to serve for the unexpired period of the term. Apparently this means the new chairman may not be re-elected at the next regular meeting of the panel.

According to the rules of procedure the panels may employ such committees as they need. In practice panels not only name committees but also utilize "groups of advisers" who furnish scientific reports required by the panels to discharge their responsibilities with respect to the fisheries concerned. The annual reports indicate that the work of the panels and their discussions are based upon reports submitted by advisory groups.<sup>90</sup>

The scheme for decentralization within NEAFC, although similar to that of ICNAF, differs in certain important particulars. The convention area is divided into three regions, described in the annex. A re-

<sup>85</sup> ICNAF, REP. OF FIRST ANN. MEETING 5 (1951). The question arose because it was thought desirable to combine rules of procedure for both the Commission and the Panel. The Commission agreed that under the convention it had no authority over Panel rules.

<sup>86</sup> *Id.* at 5, 7.

<sup>87</sup> Rule 2, *id.* at 47 (1965). The convention so provides in art. V.

<sup>88</sup> *Id.*

<sup>89</sup> ICNAF, REP. OF FIRST ANN. MEETING 7 (1951).

<sup>90</sup> Each annual report contains a section on reports of meetings of panels. Better evidence of the importance of the scientific advisers is in the Proceedings of the annual meetings where formal reports of such meetings are appended to each panel report. See, e.g., ICNAF, PROC. 15TH ANN. MEETING 1965.

gional committee, whose composition is determined by the Commission, is established for each region.<sup>91</sup> Any contracting state is entitled to representation on such a committee if it has an adjacent coastline, or exploits the fisheries therein, or exploits a stock elsewhere which is fished within the region.<sup>92</sup> In contrast to ICNAF, any degree of exploitation, whether or not substantial, suffices for membership on a committee. Also in contrast, the regional committees have far less autonomy and responsibility. The Commission decides upon committee rules of procedure as well as upon its "terms of reference."

The decentralizing arrangements described not only focus special responsibility on particular groups within the commissions but in one instance, that of ICNAF, the panel members are afforded a special competence vis-à-vis other members. Under present article VIII, if a particular panel recommends to the Commission that a certain measure be taken regarding its subarea and the Commission transmits this recommendation as a proposal to the depositary government for circulation to all contracting governments,<sup>93</sup> the proposal can become effective as to all such governments so long as the panel members' governments signify acceptance. (A 1964 amendment, not yet in effect, reverses this procedure by requiring governments to signify objection, but this does not affect the point made here.<sup>94</sup>) This means that non-panel governments cannot escape the regulatory measure by failing to accept it, should their fishermen use the subarea concerned. Of course, for proposals affecting the convention area as a whole the acceptance of all governments is necessary. This latter procedure would be altered by the 1964 amendment so that a proposal regarding the whole area is effective, without more, as to all nonobjecting governments unless the objectors constitute a majority of all contracting governments.

The North Pacific Convention also contains a certain special decision-making competence for two of the states concerned and this, as with the arrangements just described, rests on the notion that those especially affected should be given consideration in the decision-making

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<sup>91</sup> NEAFC Convention, arts. 1(2), 5.

<sup>92</sup> Article 5(2).

<sup>93</sup> The Commission itself is not in direct communication with the members, but acts through the United States, as the depositary Government. The latter Government also has a special authority in this connection. Article VIII(6) permits the depositary Government in transmitting proposals to members, to "make such suggestions as will facilitate acceptance of the proposals."

<sup>94</sup> Protocol to the Convention for the Northwest Atlantic Fisheries Relating to the Entry into Force of Proposals Adopted by the Commission, ICNAF HANDBOOK at 35.

process. Here, however, the impact of the decision extends only to those participating in it. Article III (1) provides, *inter alia*, that the Commission shall:

(c) in regard to any stock of fish in the Convention area ;

(i) Study, on request of any Contracting Party concerned, any stock of fish which is under substantial exploitation by two or more of the Contracting Parties, and which is not covered by a conservation agreement between such parties existing at the time of the conclusion of the Convention, for the purpose of determining need for joint conservation measures ;

(ii) Decide and recommend necessary joint conservation measures including any relaxation thereof to be taken as a result of such study. Provided, however, that only the national sections of the Contracting Parties engaged in substantial exploitation of such stock of fish may participate in such decision and recommendation. The decisions and recommendations shall be reported regularly to all the Contracting Parties, but shall apply only to the Contracting Parties the national section of which participated in the decisions and recommendations.

#### *F. Advisers and Experts*

In earlier discussion it was noted that in most fishery commissions the official government representatives at meetings include a body of advisers and experts. Although for the most part these advisory personnel are not separately organized within the commission structure in the form of independent committees, on occasion they are so employed. For example, in the ICNAF structure the scientific advisers to the various panels are a regular component of the organization, with elected officers and agenda, and reports of these are included in the proceedings of the annual ICNAF meeting.<sup>95</sup> Within other commissions the advisers also play a major role, particularly in staffing the innumerable ad hoc committees, subcommittees, and special working groups. In general these advisers are drawn from government scientists or persons with responsibility for fisheries matters within government agencies. However, as indicated above, occasionally advisers are not technical or scientific personnel but persons representing various phases of the fishing industry.<sup>96</sup> This pattern appears to be especially prominent in ICNAF but occasionally the same procedure is employed for representation in other commissions. So long as it is understood, as

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<sup>95</sup> See note 89 *supra*.

<sup>96</sup> As in many other instances the various commissions differ in the way they report upon this matter. ICNAF tends to identify the background of experts and advisers in the listing carried in each annual report. INPFC, on the other hand, offers no such details.

it no doubt is, that assistance from persons potentially affected by the regulatory process is not necessarily disinterested this practice is probably without undue risk to the general interest and perhaps contributes to efficiency and practicality. However, as the international regulatory system for marine resources is accorded new and broader authority, especially in connection with the economics of fishing, this practice should be kept at the focus of attention and continually reappraised to assure that the general interest of the community is safeguarded.

### III. OBJECTIVES

By and large the major goal of the fishery commissions, as provided in the basic treaties, is to determine the desirable rate of use of the species concerned, usually defined in terms of the physical yield, and to take measures to raise and maintain the stock at levels which permit this rate of use to be maximized. However, the agreements for three commissions specify the very important additional objective of allocating shares of the fishery among the members. The fur seal treaty is the leading illustration of an agreement that seeks both to provide for taking the maximum sustainable yield (subject to some qualifications noted below) and division of the harvest. The most notable aspect of this arrangement is that it provides for a form of differential compensation to the parties who make sacrifices by refraining from exploitation.<sup>97</sup> In return for agreeing not to engage in pelagic sealing, a right which they possess under the customary international law doctrine of freedom of fishing on the high seas, the states concerned are assured a certain portion of the kill made on land areas within the sovereignty of other members.

The salmon agreement also has provision for dividing the catch between the United States and Canada. The two parties agreed that since the fishery was virtually destroyed, or at least overfished, and had to be restored by "joint efforts and expense," they should share equally in the catch.<sup>98</sup> Should the effort and expense grow disproportion-

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<sup>97</sup> It should be emphasized that the reference is to the parties and not to a general category of participant in which any state might fall. As noted in discussing membership, the Fur Seal Treaty does not provide for accession by new exploiters. The principle upon which the agreement is based would, nonetheless, appear to support the position that nonmembers should be reimbursed if they refrain from exploitation.

<sup>98</sup> Salmon Convention, art. VII. The original agreement was amended by the 1957 Pink Salmon Protocol to omit the reference to the "fishing that is now largely nonexistent" and to "joint efforts and expense." Article VII now reads:

The Commission shall regulate the fisheries for sockeye and for pink salmon with a view to allowing, as nearly as practicable, an equal portion of such



tionate, requiring a greater sacrifice by Canada, it may be expected that demands for alteration in the division will be made.<sup>99</sup>

Most controversial is the North Pacific agreement which provides that Japan, and to a lesser degree Canada, will abstain from fishing named species in certain places and under certain conditions. The effect is to permit the United States and Canada to continue to take the entire permissible catch of certain species which would otherwise be open to exploitation by Japan. This arrangement is defended on the ground that the United States and Canada (and the United States only, in one instance) have already made sacrifices and will continue to make them, to build and maintain the productivity of certain species, which Japan did not traditionally exploit, and that it is desirable to reward this sacrifice by continuing the pattern of exploitation and nonexploitation, at least under certain conditions.<sup>100</sup>

In terms of the conservation goal of the various fishery commissions, *i.e.*, determination of the rate of use of the species, most but not all agreements embody the concept of the maximum sustainable yield. However, in some instances, at least, it seems clear that the policy problems faced by the commissions do not involve this goal at all and in other instances there are rather unique problems that concern the concept of maximum sustainable yield in a special way.

The Whaling Commission, for example, is faced not with the prospect of securing maximum harvest but with preventing the complete destruction of certain species and with attempting to restore stocks from levels so grievously low that the industry is verging on collapse. Despite the most expert scientific assistance, and the most explicit predictions of disaster, the Commission has either been unable to decide on the necessary restrictive measures or to secure compliance with the measures it does adopt.<sup>101</sup>

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sockeye salmon as may be caught each year and an equal portion of such pink salmon as may be caught each year to be taken by the fishermen of each Party.

<sup>99</sup> Royal, *The International Fraser River Sockeye Salmon Fishery*, in PAPERS PRESENTED AT THE INTERNATIONAL TECHNICAL CONFERENCE ON THE CONSERVATION OF THE LIVING RESOURCES OF THE SEA 243, 255, U.N. Doc. A/CONF.10/7 (1956).

<sup>100</sup> See generally van Cleve, *The Economic and Scientific Basis of the Principle of Abstinence*, 1 U.N. CONFERENCE ON THE LAW OF THE SEA 47, U.N. Doc. A/CONF.13/37 (1958).

<sup>101</sup> The following paragraph from [1964-1965] WHALING COMM'N REP. 17 is a remarkable commentary on the problems faced by the Whaling Commission:

During the later part of the meeting, Mr. S. J. Holt referred to the proposal that the Commission had made to the Director-General of F.A.O. for the collaboration of the latter with the Commission in making future assessments of the Antarctic Whale stocks. He said that the Director-General had indicated that this collaboration could not be expected if the Commission permitted the results of the scientific studies to be used merely for the organization of the more efficient destruction of the resource for which it was responsible.

The Fur Seal Commission, too, confronts a unique situation. The initial agreement, concluded in 1911 among the United States, Russia, Japan, and Great Britain, said merely that the parties desired to adopt "effective means for the preservation and protection of fur seals which frequent the waters of the North Pacific Ocean."<sup>102</sup> The convention prohibited pelagic sealing, leaving the yearly take to be harvested on the island rookeries by the individual state owning the island. As noted above, compensation was, and is, payable to those parties left unable to engage in exploitation. The policy initially pursued by the United States in managing the Pribiloff Islands herd, the largest, was not that of seeking the largest herd biologically possible but that of securing the optimum economic yield.<sup>103</sup> The present agreement, concluded in 1957 among the United States, Soviet Union, Japan, and Canada, adopts as the goal that of taking "effective measures toward achieving the maximum sustainable productivity of the fur seal resources of the North Pacific Ocean so that the fur seal population can be brought to and maintained at levels which will provide the greatest harvest year after year, with due regard to their relation to the productivity of the other living marine resources of the area." In view of the qualifying clause this is not an unequivocal affirmation of the aim of maximum sustainable yield; its purpose was apparently to take account of the possibility that fur seals prey on salmon, a resource valued highly by all four parties to the agreement. Presumably the implication is that the fur seal harvest might be increased in order to reduce the loss of salmon to these predators. The policy problem thus posed is that of determining the relationship of fur seals to other valuable resources and deciding upon a management goal in accord therewith.<sup>104</sup>

The Halibut Commission, the first to be organized, was originally intended to halt the depletion of the fishery and to raise the stocks to

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<sup>102</sup> *Preamble* to Fur Seal Convention in 26 HERTSLETS COMMERCIAL TREATIES 348 (1913).

<sup>103</sup> The following statement appears in J. TOMASEVIC, INTERNATIONAL AGREEMENTS ON CONSERVATION OF MARINE RESOURCES at 99 (1943):

Exploitation of the fur seal herd is a business based on a certain set of biological data governing the development of the herd. The aim of conservation is not to let the herd develop to biological optimum, but to develop an economically optimum herd, i.e., a herd of a numerical strength and sex and age composition that is capable of producing steadily an optimal yield. Such a herd would probably be considerably smaller than the biologically optimal herd.

<sup>104</sup> If this is the policy problem it would appear that the goal of "maximum sustainable productivity" requires very considerable qualification and that, in fact, management must make some determination of the worth of fur seals, vis-a-vis salmon. Obviously biological principles alone do not provide much assistance for this decision.

higher levels.<sup>105</sup> In 1953 the objective was broadened, and the authority of the Commission enhanced, to embrace the task of managing the fishery for the purpose of achieving the maximum sustained yield. As is well known the Commission has been highly successful in raising the yield of a depleted fishery from very low levels to consistently high ones. It is a mark of the complex, time-consuming nature of the task of securing the maximum sustainable yield that it took nearly 40 years before the Commission could announce in its 1962 Annual Report:<sup>106</sup>

The noteworthy event of the year was attainment of a total catch that was close to the maximum sustainable yield. It was the culmination of over three decades of scientific management and placed the Pacific Halibut fishery in a unique position among the marine fisheries of the world.

This achievement (and few, if any, now dispute that the Commission's scientific record is outstanding<sup>107</sup>) was not reached without substantial impact on the pattern of industry operation, including activities in fisheries other than halibut. The primary method chosen by the Commission over the years was that of reducing the catch by restricting the length of the fishing season.<sup>108</sup> To effectuate this the Commission established subareas of the entire convention area, specified catch limits for such areas and halted fishing when the limits were attained.<sup>109</sup> Other regulations imposed size limits and restrictions on gear, particularly the prohibition of trawling for halibut. The Commission in 1954 briefly remarked on the effect of this form of regulation:<sup>110</sup>

When regulation began 23 years ago the catch was only 44 million pounds and a nine-month season of fishing was required to make the catch. Under the Commission's management there has been such a progressive improvement of the stocks that the present 71 million pound catch was taken in about two months of fishing.

Perhaps in anticipation of the question whether this drastic shortening

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<sup>105</sup> The Halibut Convention of 1923, T.S. No. 701, was the first in a series of agreements. Revisions were agreed upon in 1930 and 1937 and the latter was replaced by the 1953 agreement.

<sup>106</sup> IPHC, REGULATION AND INVESTIGATION OF THE PACIFIC HALIBUT FISHERY IN 1962 in 1962 IPHC ANN. REP. 7.

<sup>107</sup> See BIOLOGICAL AND ECONOMIC ASPECTS OF FISHERIES MANAGEMENT 39, 76, 84 (J. Crutchfield ed. 1959) [hereinafter cited as CRUTCHFIELD]. Christy and Scott characterize the halibut treaty (and the salmon and tuna treaties) as "the most effective stock treaties." F. CHRISTY & A. SCOTT, THE COMMONWEALTH IN OCEAN FISHERIES 206 (1966) [hereinafter cited as Christy & Scott]. See D. JOHNSTON, THE INTERNATIONAL LAW OF FISHERIES 379-81 (1965).

<sup>108</sup> 1947 IFC ANN. REP. 10.

<sup>109</sup> *Id.* at 11.

<sup>110</sup> 1954 IPHC ANN. REP. 9.

of the fishing season might have detrimental economic impact on the industry, the two paragraphs immediately following added to this appraisal of the Commission's success as follows:<sup>111</sup>

The accumulated gain in production over the 1931 pre-regulation level now totals nearly 250 million pounds of halibut, worth about \$35,000,000 to the fleets at the annual average prices that prevailed during the period. In addition to this direct gain the reduced time required to take the increased catch has left the fleets and crews free to engage in other fisheries or other productive activities. This saving of effort has been worth at least an additional \$25,000,000 to the fishermen.

The combined economic gain of about \$60,000,000 has resulted from appropriations usable by the Commission of \$1,850,000 by both countries combined during the entire 31 years of its existence. Canada and the United States have indeed enjoyed an extremely high investment return.

These Commission statements offer illustration of a proposition that has attracted critical commentary by economists who question the amount, even existence, of gain.<sup>112</sup> Some earlier criticism has been muted in later observations and the closest observer, among economists, of the halibut fishery does not dispute that, within the objective and the methods the Commission is authorized to pursue, there have been benefits from the management program.<sup>113</sup> It is more generally accepted now that the improved levels of halibut stock since 1931 are due in major, if not sole, part to the management program and that the increased physical yield thereby secured does represent a material benefit. However, economists do emphasize, and this facet is missing from the Commission's appraisal of "economic gain" of \$60,000,000, that the regulatory program has imposed costs which have reduced the net gain below what could be realized if the governments concerned would broaden the mandate of the Commission.<sup>114</sup>

<sup>111</sup> *Id.* at 9-10. The Director of Investigations later expanded on this account. Bell, *Economic Effects of Regulation of the Pacific Halibut Fishery* in CRUTCHFIELD, *supra* note 107, at 51.

<sup>112</sup> Crutchfield, *Common Property Resources and Factor Allocation*, 22 CAN. J. ECON. & POL. SCI. 292 (1956); Gordon, *Obstacles to Agreement on Control in the Fishing Industry* in THE ECONOMICS OF FISHERIES 65 (R. Turvey & J. Wiseman eds. 1957).

<sup>113</sup> Professor Crutchfield states:

It is perfectly obvious that the greater sustained yield of more marketable fish realized under regulation is a direct boon to the consumer. The industry may well owe its very existence to the remarkably effective cooperation of the Commission, the fishermen and vessel owners, and the Governments of Canada and the United States. The real question is whether we can realize greater benefits.

Crutchfield, *Some Economic Aspects of the Halibut Program* in CRUTCHFIELD, *supra* note 107, at 79.

<sup>114</sup> *Id.* at 76-79. Bell, *supra* note 111, seeks to make a point-by-point refutation of these or comparable allegations.

The Commission is not unaware of this situation but has been unable to act because of the limitations on its authority under the treaty.<sup>115</sup> Hence it is reasonable to believe that criticism of the effect of regulations, to the extent they are undesirable on economic grounds, is not directed at the Commission or at its staff but rather at those responsible for setting the Commission's terms of reference.

The difficulty of defining the objectives of fishery management in general terms, and of conveying thereby an adequate notion of the responsibilities of the established administrative agency, is amply demonstrated by the salmon agreement and the programs undertaken pursuant to it. The initial 1937 agreement, amended in 1957 to include pink salmon, calls for the Commission to seek the "protection, preservation, and extension" of the sockeye and pink salmon resources of the Fraser River System. In practice this has been interpreted to mean that the Commission is to manage the fisheries so as to seek the maximum sustainable yield with an adequate escapement for spawning purposes.<sup>116</sup>

These very broad directives have required, and enabled, the Commission and staff to engage in a variety of activities, including not only the biological investigation of the fishery but also study of the immediate water environment and the impact upon it of the surrounding land-based activities. In the beginning the Commission confronted the major problem of determining the major causes of the decline in the fishery. Fishery practices and obstructions in the river system, artificial as well as natural, were assumed to be the main contributing factors but it was recognized that investigation was "a first duty" of the Commission.<sup>117</sup> By 1941 the Commission had identified an obstruction in the Fraser River at Hell's Gate as of major importance. In these early years the Commission's program placed great emphasis on devising a permanent solution to the problem of depletion of the fishery.<sup>118</sup> In more recent times the complexity of the relationship between the river system and the adjoining land areas has been increased by the multitude of changes in land use which affect the spawning streams that are, in turn, indispensable to "protection and preservation" of the fishery. The increasing urbanization and industrialization

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<sup>115</sup> Dunlop, *Management Practices in the Pacific Halibut Fishery and Their Relation to the Biology of Conservation*, in CRUTCHFIELD, *supra* note 107, at 41. See also James, *Political and Sociological Limitations of Fishery Management*, *id.* at 23-30.

<sup>116</sup> 1965 IPSFC ANN. REP. 3-6 discusses the complexities of this undertaking.

<sup>117</sup> [1937-1938] IPSFC ANN. REP. 6.

<sup>118</sup> The annual reports for years 1941 through 1944 provide ample evidence of the importance of these obstructions in the Commission's work.

of the area impose new problems on the Commission and in time will likely require some difficult choices on the part of the governments concerned.

Throughout its history the Salmon Commission has also had to contend with the involved task of acquiring knowledge about the various species of salmon which together constitute the Fraser River salmon runs. In addition it has been necessary to devise means by which selected fishery pressure can be exerted on the various runs as escape-ment requirements indicate. And, at the same time, the Commission has had to maintain a regulatory scheme which divides the catch equally between the two national groups of fishermen.

Among the final three Commissions whose common goal is that of making possible the maximum sustainable yield, IATTC, ICNAF, and INPFC, there are also notable differences in the contexts of their operations. The Tuna Commission (IATTC), first of these to become active, and ICNAF were both formed in anticipation of the problems of excessive fishing, but because the former is limited to certain species while the latter is aimed at all the species of a defined area, they have widely different scope. The Tuna Commission had concluded by 1956-1957 that the yield from none of the species had passed the maximum sustainable<sup>119</sup> but by 1961-1962 analysis showed that the yield from one of the major species, yellowfin tuna, had come to surpass the maximum sustainable and that catch limitations were now required to restore the stock to an optimum level.<sup>120</sup> In 1966 member governments accepted the Commission's recommended regulations and put them into effect; in addition two nonmembers, Japan and Canada, agreed to abide by the recommendations.<sup>121</sup>

ICNAF faces perhaps the most complicated problems of all the Commissions sharing the same goal because, first, it includes a relatively large number of members, and second, it is concerned with a considerable variety of fish in the convention area, which enormously aggravates the difficulty of determining a maximum sustainable yield. This Commission is also distinguished by the explicitness of its recognition that economic considerations must be taken into account in its regulatory efforts. At its 1965 meeting ICNAF discussed the general subject of "Review of Possible Conservation Actions for the Commission Area" on the basis of a document so entitled and prepared by

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<sup>119</sup> See 1956 IATTC ANN. REP. 3.

<sup>120</sup> 1961 IATTC ANN. REP. 3-4.

<sup>121</sup> PACIFIC FISHERMAN, Oct. 1966, at 10.

W. Templeman, Chairman of the Research and Statistics Committee and J. Gulland of the Assessments subcommittee.<sup>122</sup> The memorandum places heavy emphasis upon the economic implications of alternative actions in different contexts and upon the many real problems in attaining the goal of maximum sustainable yield. The summary of discussion in the Commissioner's meeting reflects general awareness of the economic implications of regulation, although it appears that the Commission thought it premature to examine those difficulties within the Commission until the subject had been examined within the various member states.<sup>123</sup> It did, however, agree on the desirability of sending an ICNAF representative to an FAO meeting of experts to study economic aspects of fishing yield.<sup>124</sup>

The attitude within ICNAF may well be affected by the fact that several members are also members of NEAFC where economic aspects had previously been discussed.<sup>125</sup> NEAFC is relatively unique in that the goal of the group is described in the basic agreement merely as that of ensuring conservation and rational exploitation of the fisheries of the convention area. No commitment is recorded regarding the particular yield to be sought. It seems likely that this stems from the belief that it is both desirable and possible to establish wider goals for the regulatory process.

The North Pacific Commission's objective of ensuring maximum sustained productivity has until relatively recently been subordinate to the accompanying goal of allocating the yield of certain species through the principle of abstention. For the first five years of the agreement no determination could be made on the question of whether or not these species continued to qualify for abstention.<sup>126</sup> For present purposes the most important criterion for this decision is that "evidence based upon scientific research indicates that more intensive exploitation of the stock will not provide a substantial increase in yield which can be sustained year after year."<sup>127</sup> This is not an unequivocal statement requiring proof that a stock is not yielding the

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<sup>122</sup> ICNAF Doc. Serial No. 1450 (1965).

<sup>123</sup> ICNAF, REPORT OF THIRD MEETING OF COMMISSIONERS, ICNAF Doc. Serial No. 1572 (June 10, 1965).

<sup>124</sup> The Standing Committee on Research and Statistics, meeting prior to the annual meeting, recommended that the Committee "be enabled to seek active participation by economists in the same way as statisticians, biologists, and oceanographers at present take part." ICNAF REDBOOK pt. I, at 34 (1965).

<sup>125</sup> *Id.* Comment by Mr. Aglen of the United Kingdom.

<sup>126</sup> INPFC Convention, art. III(1) (a).

<sup>127</sup> *Id.* art. IV(1)(b)(i).

maximum sustainable catch, but apparently there is need to show that the catch is nearly that level.

On four occasions the Commission has acted to remove stocks from abstention. In 1959, 1961, and 1962 the Commission decided that the herring stocks off Alaska, the continental United States and west of the Queen Charlotte Islands no longer qualified for abstention. Also in 1962 the Commission removed the halibut of the East Bering Sea from the requirement of abstention. When these stocks were opened to joint exploitation by all parties it became necessary to consider conservation regulations framed for the purpose of managing the fisheries in order to obtain the maximum sustained yield. In the future, if this Commission continues to have one,<sup>128</sup> its work is more and more likely to be in the area of regulating joint fishery exploitation by all parties.

In commentary on the above description of objectives of the commissions, it may be noted that only the NEAFC Convention appears to anticipate the importance of economic considerations. It is not intended here to attempt to add to the debate between biologists, economists, and administrators about the importance of maximum net economic yield in contrast to maximum physical yield, except to observe that the two sides to the debate obviously share more points of agreement than disagreement. Moreover, despite divergent reports it seems highly probable that commissions do have a keen appreciation of economic influence and that, indeed, it is in a sense impossible to operate without regard to these considerations.<sup>129</sup> For example, study of fishing effort probably cannot be successful unless economic and social factors are taken into account. And beyond this the extent to which industry groups are represented in formal advisory committees or as advisers, and therefore a part of a national delegation, presents every opportunity for pressing the relevance of at least some economic considerations.<sup>130</sup>

Again no novelty attends the observation that no matter how advanced economic studies of fishery operations become and no matter how explicitly economic factors are recognized, the overriding problem is that of persuading national decision-makers and, in the end, the

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<sup>128</sup> It is well-known that the Commission now exists on a year-to-year basis since under INPFC Convention, art. XI, any contracting party may give notice of termination to the other parties "whereupon it shall terminate as to all Contracting Parties." There is a good deal of speculation about the effects of this possibility of termination upon the Commission's decision to recommend removal of the East Bering Sea from abstention by the Japanese. See generally *Hearings*, *supra* note 72.

<sup>129</sup> See James, *supra* note 115, in CRUTCHFIELD.

<sup>130</sup> CRUTCHFIELD 76, 79.



industry itself of the desirability of certain actions. The point to be emphasized is that the commissions and the industry must be viewed in the context of the whole social process of which they are a part, the social process which affects them, and which they in turn affect. Specialists in various segments of this process thus may make a contribution to the more effective operation of international (and national) decision-making mechanisms. In particular, sociologists and social psychologists could play a key role in influencing events. This is by no means an affirmation that the commissions and those benefitted by their work cannot successfully operate without the additional input, but there can be no serious doubt that the degree of success might be materially heightened by a far more sustained and elaborate investigation of all factors influencing the decision-making process.

#### IV. DISTRIBUTION OF AUTHORITY WITHIN THE COMMISSIONS

Within the competence conferred by treaty upon the various commissions, various decision-making functions are required to be performed by the commission and component organs, persons and groups. We are here concerned with the internal operation of the commission and seek to describe who exercises what authority function vis-à-vis another organ or official of the group. In a more complete study a similar analysis would be expanded to include commission relations with member states and other participants. The various subheadings to follow are intended to indicate authority, or decision-making functions and the precise references for each of these terms may be seen in the discussions subsumed under each. For convenience in this examination we refer briefly to the scope of the various competences exercised by the commissions in discharge of their duties, although in a formal sense this is an aspect of the external relationships of the commissions. The examination is limited to three decision-making functions—intelligence, recommendation and prescription—because these appear to be most important for the internal decision-making process. But complete inquiry would embrace also the invocation, application, appraisal, and termination functions.<sup>131</sup>

##### *A. Intelligence*

The intelligence function is that of securing information to serve as a basis for decisions and recommendations or, in more general state-

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<sup>131</sup> For more intensive examination of these decision functions see McDougal, Lasswell, & Reisman, *The World Constitutive Process of Authoritative Decision*

ment, for the execution of all other decision-making functions. There are very great differences among the commissions both in the scope of the treaty provisions authorizing this particular activity and in the allocation of responsibilities for discharge of the function. These differences exist despite the fact that in the end all commissions share the task of making decisions to prescribe, or more usually, to recommend measures which are to be based upon information about particular resources and their environment.

The Northeast Atlantic, halibut, and salmon agreements all contain relatively brief, general statements concerning intelligence activities. Indeed that in the first-named agreement is almost enigmatic, stating merely that the Commission is "to keep under review the fisheries in the Convention area." More than likely this brevity is due to the arrangement envisaged in article 11 under which the Commission "shall when possible seek the advice of the International Council for the Exploration of the Sea and the cooperation of the Council in carrying out any necessary investigation and, for this purpose, may make such joint arrangements as may be agreed" with the Council.<sup>132</sup>

The two oldest agreements, the halibut and salmon, are almost equally brief.<sup>133</sup> The former merely states that the Commission "shall make such investigations as are necessary into the life history of the halibut in the Convention waters."<sup>134</sup> The salmon treaty is a bit more elaborate, enjoining the Commission to "make a thorough investigation into the natural history of the Fraser River sockeye salmon, into hatchery methods, spawning ground conditions, and other related matters" and to make investigation of the obstructions to the ascent of the salmon in the river system.<sup>135</sup>

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(Mimeo. 1966). See also H. LASSWELL, *THE DECISION PROCESS: SEVEN CATEGORIES OF FUNCTIONAL ANALYSIS* (Bur. of Gov'tal Research, Univ. of Maryland, 1956).

<sup>132</sup> It is of interest to note that the Northeast Atlantic Convention differs from the others with respect to the basic purpose of scientific investigation. Whereas the Tuna and ICNAF treaties both enjoin the Commission to make recommendations "on the basis of scientific investigations," the Northeast Atlantic Convention only requires this "so far as practicable." This appears to support the observation that this Commission's objectives are more broadly conceived than those which are formulated in terms of the physical yield of the fishery concerned.

<sup>133</sup> The Fur Seal Commission was not established until 1957 although the basic agreement was concluded in 1911.

<sup>134</sup> Halibut Convention, art. 3. This provision does not differ in any material way from that in the original convention, concluded in 1923.

<sup>135</sup> Salmon Convention, art. III. This provision was in the original agreement concluded in 1930 and was not changed by the 1957 Protocol. However, Article VI of the Protocol divides certain research responsibilities regarding pink salmon as follows:

1. The Parties shall conduct a coordinated investigation of pink salmon stocks which enter the waters described in Article I of the Convention for the purpose of determining the migratory movements of such stocks. That part

INPFC contains several provisions concerning intelligence activities in relation to the stocks of fish in the area. The major tasks of the Commission in this respect are to "study" certain stocks of fish to determine whether they meet certain conditions requiring one or two of the parties to abstain from exploitation,<sup>136</sup> to study certain stocks to determine whether there is a need for joint conservation measures,<sup>137</sup> to "investigate the waters of the Convention area to determine if there are areas in which salmon originating in the rivers of Canada and of the United States of America intermingle with salmon originating in the rivers of Asia,"<sup>138</sup> and to conduct further studies with the purpose of recommending new areas in which the exploitation of salmon should be abstained. In addition the Commission is to "compile and study" records which it might obtain from the parties and to submit reports of its activities to the parties.<sup>139</sup>

The Tuna and Northwest Atlantic agreements, concluded at about the same time, contain basically the same provisions on types of intelligence activities, except that the scope of the former treaty's interest is restricted to a few species. Article VI of the ICNAF treaty provides:

The Commission shall be responsible in the field of scientific investigation for obtaining and collecting the information necessary for maintaining those stocks of fish which support international fisheries in the Convention area. . . .

Article VI also details the operations which the Commission itself may undertake in fulfilling this responsibility or which may be undertaken by other organizations on the Commission's behalf. The Commission can make investigations "into the abundance, life history and ecology of any species of aquatic life in any part of the Northwest Atlantic Ocean;" collect and study information about the current conditions and trends of Northwest Atlantic fishery resources; hold or arrange hearings for the purpose of gathering factual information; conduct fishing operations for purposes of scientific investigation; and publish reports of findings. The provisions of the tuna agreement parallel these in every important respect.<sup>140</sup>

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of the investigation to be carried out in the waters described in Article I of the Convention shall be carried out by the Commission.

<sup>136</sup> INPFC Convention, art. III(1)(a), (b).

<sup>137</sup> *Id.* art. III(1)(c)(i).

<sup>138</sup> *Id.*, Protocol.

<sup>139</sup> *Id.* art. III(1)(e).

<sup>140</sup> IATTC Convention, art. II.

The Whaling Convention provides that the Commission is to:<sup>141</sup>

(a) encourage, recommend, or, if necessary, organize studies and investigations relating to whales and whaling; (b) collect and analyze statistical information concerning the current conditions and trend of the whale stocks and the effects of whaling activities thereon; (c) study, appraise, and disseminate information concerning methods of maintaining and increasing the population of whale stocks.

The formulation is sufficiently broad to subsume any inquiry pertinent to the Commission's objectives.

The same may be said for the Fur Seal Convention provision on the intelligence function. Article II thereof sets out the detailed research program the parties agree to coordinate among themselves and adds the very general category of "other subjects involved in achieving the objectives of the Convention, as determined by the Commission. . . ." In a sense this is the broadest mandate possible for it would authorize research into social and economic problems where pertinent to the Commission's objectives. It is not difficult to interpret the objectives of the parties in this sense.<sup>142</sup>

Turning to the identification of those who engage in the intelligence function, the most important distinction is the use of a professional staff by three Commissions, the halibut, salmon, and tuna.<sup>143</sup> Only these three groups have a permanent international organ specialized to the task of providing the information upon which decisions or recommendations can be founded. The effect of this method of serving the intelligence function appears to be highly beneficial since these three organizations are widely regarded as the most successful of the various commissions. Although each of the three Commissions employs a full-time staff, only the Tuna Convention so provides in the basic treaty. Article I(13) spells out the duties of the Executive Director in explicit detail, including the important task of "drafting of programs of investigation." The pivotal nature of this responsibility is emphasized further by the later provision that Commission recommendations for joint action by the contracting parties are to be made "on the basis of scientific investigations."<sup>144</sup> The beneficial effects of this arrangement, as executed by highly capable directors and staff, are evidenced by

<sup>141</sup> Whaling Convention, art. IV.

<sup>142</sup> See text accompanying note 104 *supra*.

<sup>143</sup> For other discussions of this topic, see R. VAN CLEVE & R. JOHNSON, *MANAGEMENT OF THE HIGH SEAS FISHERIES OF THE NORTHEASTERN PACIFIC* 43-46 (Univ. of Wash. Pub. in Fisheries, New Series, Vol. II, No. 2, 1963) [hereinafter cited as VAN CLEVE & JOHNSON]; CHRISTY & SCOTT, *supra* note 107, at 205-07.

<sup>144</sup> IATTC Convention, art. II(5).

the success in obtaining member acceptance of Commission recommendations. As noted above, the first task for the director and staff was to investigate the fisheries to determine what the situation was in relation to the need for conservation regulations. Several years of investigation by the staff led to the determination in 1956 that none of the fisheries required conservation regulations because none were being overfished. Members accepted this conclusion of the staff, a not inconsiderable achievement considering the political climate of that time in terms of the oft-expressed fears about grave and damaging overfishing in the eastern Pacific.<sup>145</sup> It is doubtful that this clarification regarding the situation in the important tuna fisheries could have been obtained without the work of an independent, international staff. In addition, later in 1962, the staff concluded from research results that yellowfin tuna were being overfished, and on this basis the Commission promptly recommended that the members take joint action to institute specified conservation measures. By 1966 all members agreed to implement conservation regulations. Again, in accounting for this achievement, considerable weight must be given to the work of an independent staff organization.

In sum, it is apparent that entrusting research responsibilities to a relatively independent, internationally composed body adds considerable strength to a fishery commission.<sup>146</sup> Scholarly observers identify these elements of strength in terms of the high quality and objectivity of research results, the development in the staff of a sense of identity with the commission rather than with one of the members, the enhancement of the commission's power vis-à-vis members, greater acceptability for commission recommendations, and strong centralized leadership.<sup>147</sup> In light of this very favorable experience with staff research, the recent decision to decentralize research work in the newly created Atlantic Tuna Commission appears strange indeed.<sup>148</sup>

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<sup>145</sup> It may be recalled that during the period 1950-1958, *i.e.*, the years before the Geneva Conference on the Law of the Sea, there was very considerable agitation in the Central and South American states concerning the need for conserving fishing resources in adjacent seas.

<sup>146</sup> If the Commission is in fact stronger for having a professional staff, however, it is probably more significant to consider the factors which led to the establishment of an independent staff in the first place. Admittedly the staff is an important ingredient of strength but the more basic underlying factors also deserve closer inquiry.

<sup>147</sup> VAN CLEVE & JOHNSON, *supra* note 143, at 45-46.

<sup>148</sup> *But see* CHRISTY & SCOTT, *supra* note 107, at 207, where they state:

It is not clear which approach is better—dependence of the commission upon national research efforts or the creation of the commission's own research staff and facilities.

The case against the independent staff is summarized as follows:

The Northeast Atlantic Commission also seeks to secure information for its purposes from an international body, not from a constituent part of the Commission in this case, but from a separate international group, the International Council for the Exploration of the Sea (I.C.E.S.). This continues the arrangement inaugurated in 1946 by the Convention for the Regulation of the Meshes of Fishing Nets and the Size Limits of Fish under which the Permanent Commission established by the Convention was to "consult" with the I.C.E.S. "where practicable."<sup>149</sup> Although the I.C.E.S. is an international body, its use is not necessarily equivalent to the employment of an independent staff. The I.C.E.S. itself does not engage in research, except with respect to hydrography, but exists to encourage, promote, and coordinate the research activities of its members.<sup>150</sup> In the end, therefore, investigative activities are still largely within national control. Nonetheless, the divorce of the intelligence function from the commission responsible for making recommendations could act as a barrier to excessive political intrusion into the research process.

On the western side of the Atlantic, in the Northwest Atlantic Commission, the conduct of scientific investigation is also decentralized and is pursued by scientists from individual member nations. Despite the extensive enumeration of intelligence activities in the convention, direct Commission participation was not apparently intended to be extensive. The Conference which established ICNAF adopted a recommendation declaring:<sup>151</sup>

In the field of scientific investigations the Commission should be primarily responsible for: (a) arrangement for and coordination of work by agencies, and (b) establishment of working relationship with international agencies. It is important, for the purposes of the Convention, that enlarged and coordinated scientific investigations should be carried

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The alternative point of view states that a commission research staff will act as an independent bureaucracy, tending to develop a vested interest in its own point of view, becoming overly defensive of its own past decisions, and using its claim to impartiality as a shield against criticism. It is claimed that free argument and contention among scientists from different nations leads to constructive criticism and perhaps to better results in the long run.

Unfortunately, the authors leave the reader to speculate both about the evidence suggesting this view and about the source of the "alternative point of view." Purely as speculation it may be thought that the authors are stating a point of view they themselves have developed and that, continuing to speculate, the activities and attitudes of the staff of the Halibut Commission may have suggested the ingredients of this "alternative point of view."

<sup>149</sup> Article 12(5). Text in 2 A. PEASLEE, *INTERNATIONAL GOVERNMENTAL ORGANIZATIONS* 1692 (2d rev. ed. 1961).

<sup>150</sup> The latest agreement on I.C.E.S. on hand is the original of 1902 as revised in 1950. *Id.* at 1118. I have been unable to locate the 1964 I.C.E.S. agreement.

<sup>151</sup> 1951 ICNAF ANN. REP. 24.

out and such investigations insofar as possible should be conducted by agencies of the Contracting Governments or by public or private agencies (*e.g.*, universities or private marine research laboratories). If investigations necessary to the purposes of the Convention cannot be arranged through existing Government, public, or private agencies, they should be undertaken by the Commission, but only in accordance with approved budgets. It is not contemplated that any such investigations conducted by Commission personnel or equipment would include field operations.

Perhaps it is clear from this passage that a major determinative factor in the selection of the role of the Commission in intelligence gathering was financial, leading to a desire to avoid creation of an international scientific staff. The admonition that Commission investigations, if necessary, should be "only in accordance with approved budgets" appears wholly gratuitous except as an indication that the Commission was not to undertake large operational expenditures.

Other intelligence functions are performed by the Northwest Atlantic Commissioners, acting, apparently, as representatives of their respective governments (as distinguished from acting as a body), as well as by panels, committees, and the secretariat. In terms of the Commission's ultimate objectives the intelligence functions allocated to the panels seem most significant. Each panel is responsible, within its subarea, for "keeping under review" the fisheries and the scientific and other information related thereto. As noted above, this function is discharged in part by the use of groups of "scientific advisers" who are attached to each panel and who meet formally to adopt recommendations for submission to the panels. Indeed, the scientific advisers perform the major intelligence role in panel operations. The panels were apparently intended to be available for even wider service, as implied by the provision that "Each Panel shall investigate and report to the Commission upon any matter referred to it by the Commission."<sup>152</sup> The channels for conveying information are established in the rules of procedure for the panels. There it is specified that a summary report of all proceedings of all panel meetings is to be prepared and submitted to the panel chairman, who must in turn furnish a summary report of all panel meetings to the Commission.

The Executive Secretary of ICNAF, as the principal full-time staff member of the Commission, is pivotal in the discharge of intelligence functions. Although no specific activities other than direction of the staff are specified in the convention, the general directive that the

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<sup>152</sup> ICNAF Convention, art. VII(5).

Executive Secretary "shall perform such other functions as the Commission shall prescribe,"<sup>153</sup> furnishes ample basis for the numerous specific intelligence operations performed by the Executive Secretary and the staff. These include extensive work in the collection, collation, and dissemination of statistics regarding convention area fisheries, the preparation of the numerous publications issued by the Commission, the maintenance of informational exchanges with other international groups concerned with fisheries, especially FAO and ICES, the compilation of the individual research reports submitted by the various governments, and direct personal communication with national fishery officials and groups. A rough indication of the scope of the Secretariat's role in the intelligence process may be seen in the growth of the budget item for "contractual services including printing" from \$2000 for 1952-1953 to \$22,100 for 1964-1965.<sup>154</sup>

Other more specific duties of the Secretariat in the intelligence process involve the maintenance of records of all commission meetings and their circulation to members and commissioners, as well as certain assignments in the receipt of information, such as those regarding advisory committee members authorized to attend commission sessions and the credentials of commissioners.

A final important intelligence task of the Executive Secretary is providing information about financial requirements of the Commission. It is his duty to prepare and submit budget estimates to the Commission and he is authorized to supplement information and explanation requested by the Commission with such additional material as he believes "necessary and useful."<sup>155</sup> Information regarding financial contributions is also to be supplied to the Commission by the Executive Secretary.

The individual commissioners of ICNAF also have certain intelligence activities assigned to them including, most importantly perhaps, that of arranging "where feasible, for all reports on subjects of interest to the Commission which are published in their own countries to be sent to the Executive Secretary for record purposes."<sup>156</sup> In addition the commissioners are to inform the Executive Secretary of those advisory committee members authorized to attend nonexecutive sessions of the Commission and the panels.<sup>157</sup>

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<sup>153</sup> *Id.* art. III (3).

<sup>154</sup> [1951-1952] ICNAF ANN. REP. 19; [1962-1963] ICNAF ANN. REP. 15.

<sup>155</sup> ICNAF HANDBOOK, Financial Regulation 3.3, at 51 (1965).

<sup>156</sup> *Id.* Rule of Procedure 23(b), at 46.

<sup>157</sup> *Id.* Rule of Procedure 2, at 39.



One of the committees established by ICNAF appears to serve, primarily, an intelligence function. The convention itself makes no mention of committees, but the Rules of Procedure emphasize that this particular function is the prime duty of the Committee on Research and Statistics. Rule 16(c) declares, in relevant part:<sup>158</sup>

The Committee shall develop and recommend to the Commission such policies and procedures in the collection, compilation, analysis, and dissemination of fishery statistics as may be necessary to insure that the Commission has available at all times complete, current, and equivalent statistics on fishery activities in Convention waters.

Although the annual reports are very likely not the best source of evidence on the operations of the committee in carrying out its mandate, it is nonetheless clear from even the brief summaries of committee activities contained in these reports that rigorous and sustained efforts have been devoted to improvements in research and in the whole process of identifying, gathering, analyzing and disseminating statistical information.<sup>159</sup> It would be fruitless to attempt to summarize the detailed work of this committee or the special committees formed from time to time to deal with this particular subject.

Decentralization of research responsibilities is especially conspicuous in the North Pacific Fisheries Commission, whose annual reports indicate that the parties consider this as far more than a matter of form. Expert observers regard its decentralized research as a substantial obstacle to more successful operation of the Commission and express the view that provision for an independent scientific staff is needed, among other steps if the situation is to be corrected.<sup>160</sup>

It is true that the Commission establishes its own research program, at least in broad outline, but for actual research it relies upon agencies of the three member governments.<sup>161</sup> Efforts are made, through the Standing Committee on Biology and Research, to coordinate the tentative research plans of each national section and the Executive Secretary also serves a coordinating function as plans mature and are revised and modified. However, the parties appear to wish to make com-

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<sup>158</sup> *Id.* Rule of Procedure 16(c), at 44.

<sup>159</sup> The dimensions of this work are better seen in the Committee Reports which are sufficiently extensive to be published separately. See, e.g., ICNAF REDBOOK pt. I (1965) which consists of the Committee Report.

<sup>160</sup> VAN CLEVE & JOHNSON, *supra* note 143, at 49.

<sup>161</sup> This policy and procedure were adopted at the first annual meeting. 1954 INPFC ANN. REP. 1-2.

pletely clear that each national agency retains full and final control over the scope of its research efforts.<sup>162</sup>

The major intelligence work of INPFC is undertaken in various committees, but the sources of the information upon which the committees base their work and their recommendations appear to vary somewhat, depending on the stock of fish involved and the specific decision to be made. The two major committees involved are the Committee on Biology and Research (hereinafter cited as CBR), and the Ad Hoc Committee on Abstention. The CBR is primarily responsible "for the planning, assignment, coordination and analysis of the results of research on salmon on the high seas,"<sup>163</sup> but it also has duties in connection with effects of the Bering Sea groundfishery upon halibut, with king crab, and with oceanography relating to salmon distribution. In the past, the CBR has devoted major attention to the salmon question, primarily in connection with the Commission's duty under the Protocol, to study the convention waters to determine the area of intermingling of American and Asian salmon. Although the chances seem virtually nonexistent for implementing the Protocol fully, the CBR continues to devote a predominant share of its labors to this subject, utilizing the services of large numbers of scientists during the meetings which precede and accompany the annual meeting of the Commission.<sup>164</sup> The information relevant to the distribution and origin of salmon comes to the committee from the individual national members, and the committee, or its subcommittee(s) on salmon, are supposed to advise the Commission as to its meaning and effect.<sup>165</sup> It is instructive to note that the subcommittees working on this subject are directed to reach agreement on how the data should be interpreted, but are also expected to report differing views if agreement cannot be reached.<sup>166</sup> It is probably this procedure of wholly decentralized initial research, coupled with the need for agreed interpreta-

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<sup>162</sup> 1956 INPFC ANN. REP. 4 notes that in seeking Commission objectives the studies are being conducted by research organizations of the three participating countries, the Commission being charged by the Convention to utilize the technical and scientific services of official agencies of the Contracting Parties and their political sub-divisions, insofar as feasible.

A later report states that "research plans for investigation of salmon on the high seas in 1964 are tentative in nature and subject to modification by the various participating agencies, as funds, equipment and staff require." 1963 *id.* at 9.

<sup>163</sup> 1964 *id.* at 4.

<sup>164</sup> At the 1965 meeting it is estimated that at least half of the CBR Report and appendices thereto were devoted to this specific subject or to background matters relating thereto. 1965 INPFC Proc. 79-203, Doc. No. 840, with apps.

<sup>165</sup> 1963 INPFC ANN. REP. 6.

<sup>166</sup> *Id.*

tions of it, which accounts for the comment by knowledgeable observers that research results have come to be viewed merely as bases for negotiation.<sup>167</sup> The inference to be drawn from this appears to be that research findings are on occasion regarded as political gambits, subject to treatment as such, rather than as objective scientific determinations providing a basis for concerted action. How often these episodes occur is not evident in the annual reports; hence little can be said of the extent of harm this practice does to the decision-making process involved. But it would appear fairly certain that some damage is caused, for surely the process of negotiating scientific results threatens to strip the "agreed" results of any claim to objectivity and, thereby, to reduce prospects of longrun acceptance.<sup>168</sup> Some hint of the consequences of this practice may perhaps be seen in the terms of reference laid down for the Salmon Subcommittee of the CBR. After noting that the subcommittee was to report the differing views of the members if agreed interpretation could not be reached after a reasonable attempt, the subcommittee was informed that "the jointly-agreed scientific reports on each salmon species which were prepared at the 1960 and 1961 annual meetings were not to be reopened for amendment."<sup>169</sup> This may be no more than a notation that further research results are not needed with respect to certain questions, but it also bears the interpretation that it is better to leave certain findings at rest, even if new information appears to challenge them and to indicate a need for new "agreed reports."

This concern for agreement on scientific matters may be reflected also in the care taken to establish other procedures for the reporting of research results. The CBR has created a group of "Editorial Referees," "one of whose functions is to review scientific materials submitted from national sources for publication in the Commission's bulletin series."<sup>170</sup> The nature and scope of this review are not further clarified in the annual reports, except that the referees may approve or disapprove of the contents.<sup>171</sup> Whatever it consists of, this review is a

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<sup>167</sup> See VAN CLEVE & JOHNSON, *supra* note 143, at 44.

<sup>168</sup> This text statement is not an assertion that scientific results are formulated with such precision that they leave no room for argument. Nor do I contend that value judgments do not play a role in determining what is accepted as scientific "truth." However, admitting these qualifications, the more or less conscious intrusion of political considerations is an entirely different matter and it is such intrusion that is referred to in this instance.

<sup>169</sup> 1965 INPFC ANN. PROC. 81.

<sup>170</sup> 1960 INPFC ANN. REP. 9.

<sup>171</sup> This is an interpretation of the following sentences:

The Commission publishes research bulletins, which contain scientific papers

prerequisite to the Commission's approval which must be secured for all publications.

At least two subsidiary groups within the North Pacific structure do make use of an international source of intelligence. The Subcommittee on Bering Sea Groundfish and the Committee on Gulf of Alaska Groundfish have made relatively intensive use of staff members from the International Pacific Halibut Commission in connection with problems within their purview.<sup>172</sup> In connection with recommendations regarding halibut conservation measures in the East Bering Sea, the facilities and staff of the Halibut Commission seem to be especially useful. For the 1963 season, information regarding American and Canadian fishing in this area was relayed by the Halibut Commission to the North Pacific Commission headquarters.<sup>173</sup> In implementing conservation measures in this area the North Pacific Commission adopted a subcommittee report containing recommendations that the staff maintain "continuous liaison" with the Halibut staff and that "the Canadian and United States Sections of the International North Pacific Fisheries Commission recommend to their governments that they request their commissioners on the International Pacific Halibut Commission to have their staff work closely with the staff of the International North Pacific Fisheries Commission in assembling and interpreting the catch and effort data and determining the closing date."<sup>174</sup>

This latter statement indicates the formal methods for coordinating the intelligence activities of the two organizations, whereby the cooperation of one commission staff is not requested directly by another but rather by the more roundabout fashion of soliciting the intercession of the member governments. However, there is no doubt that informal communications between staffs occur without regard to this procedure. In addition several members of the Halibut staff have been listed as "consultants" to the Commission in the meetings since 1963.

The final major area of intelligence activities concerns the Ad Hoc Committee on Abstention (hereinafter cited as AHA) which bears the responsibility for deleting species from the abstention list or adding species to it. For this purpose the Commission is supposed to study

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submitted from national sources and those prepared by the joint efforts of scientists from the member countries. All papers pertain to the Commission's research programs. Before submission to the Commission for approval for publication, each paper must receive the approval of three editorial referees.

1961 INPFC ANN. REP. 10.

<sup>172</sup> 1965 INPFC ANN. PROC. 139, 205.

<sup>173</sup> 1963 INPFC ANN. REP. 15.

<sup>174</sup> *Id.* at 19.

the stocks concerned to determine whether they meet the requirements specified in article IV. The methods chosen for this task testify to the difficulties stemming from the decentralized method of obtaining information. In 1955 the Commission established procedures by which it would "study" the stocks.<sup>175</sup> These consisted of requesting the parties managing an abstained stock to submit a report on the management, paying particular attention to abstention requirements. A committee was established, which later acquired the title of Ad Hoc Committee on Abstention, to consider these reports and make recommendations to the Commission. The results of this arrangement are mixed—on four occasions the Commission has decided to delete certain stocks in certain areas from abstention. However, there has always been major controversy about compliance by the United States and Canada with this procedure and with the provisions of article IV. From time to time Japan has complained that no information at all has been submitted on fisheries for which requests have been made for data; that a large mass of data is furnished but in a form that makes it difficult to review or to relate to particular convention provisions; and that the data does not establish that the convention requirements on abstention are satisfied. Of these difficulties only the first two relate to the manner in which information is secured; the last could be raised no matter who provides the basic data. However, it seems to be very clear that all three objections are related. After all, it is the United States and Canada who determine the scope and detail of their reports and who also have a decisive voice in determining whether the data contained therein supports continued abstention. In the absence of an international staff there is no method of checking the information submitted since, by definition, Japan is excluded from the fishery. Understandably, then, dispute is likely to center upon definitions of concepts and compliance with standards, except on those occasions when little or no data is forthcoming. The flavor of the Japanese discontent may be seen in the following statement of its spokesman on the AHA:<sup>176</sup>

Commissioner Iwao Fujita stated in reply that Japan could not agree with the views expressed by the Canadian and United States members. Japan was not asking for perfection nor for irrefutable evidence, but the abstention principle made this Convention an unprecedented one and complicated Japan's fishery relations with a number of countries. To

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<sup>175</sup> 1955 INPFC ANN. REP. 4.

<sup>176</sup> 1965 INPFC ANN. PROC. 245.

justify this relinquishment of the freedom of high seas fishing to the people of Japan was a heavy responsibility, and the evidence must naturally be strong and rigorously interpreted. It was the responsibility of the Japanese National Section to insist upon this kind of evidence. The Committee had met annually since five years after the Convention entered into force, and the Japanese National Section was still waiting to learn under what conditions certain stocks now listed in the Annex could be removed from abstention. The definitions of such terms as "stock," "maximum sustainable yield," and "substantial increase" had been debated repeatedly without reaching agreement. The red salmon of Bristol Bay, the sockeye of the Fraser River, and the stocks farther south all presented different conditions, yet the United States and Canada maintained that they all satisfied the conditions for abstention. Japan had asked repeatedly when and under what conditions the United States and Canada would consider removing certain stocks from the Annex. The only answer had been that it was very difficult to say. As for the herring of the Queen Charlotte Islands, the Japanese National Section required an explanation of the difference in conditions between the areas where they had been removed from abstention and those where they remained under abstention. As for halibut, explanations had been received regarding Areas 2 and 3A but none had been forthcoming with respect to areas 1 and 3B South. The Japanese National Section's interpretation of Article IV(1)(b) made it necessary that further information be emphatically requested. The Convention required that the abstention cases be discussed annually and that recommendations be made. Treatment of this requirement had become negligent in recent years, and this meant that the members were not fulfilling their obligations under the terms of the Convention. The Committee should carry on its deliberations conscientiously, but without the necessary information it could not do its work properly.

Turning from the Commission and committees to the Secretariat, the Executive Director and Assistant are probably more active in connection with intelligence than with any other decision-making function. The role of the Executive Director includes some work in the collection of information, but his primary task is that of acting as a center for distributing reports and information, coordinating the operations of the national agencies and supervising the actual publication of information.<sup>177</sup> The first-mentioned duty arises from convention provisions which call for the parties to furnish such reports as the

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<sup>177</sup> The following appears in 1956 INPFC ANN. REP. at 17:

In general it [the staff] must endeavour to keep a free and efficient flow of data, samples, techniques and personal contacts between researchers and to assist the Commission and its working committees on a year-round basis. A description of the functions of the staff must emphasize the words "promote," "coordinate," and "report."

Commission designates.<sup>178</sup> By Commission decision the Executive Director engages in the accumulation of these records.<sup>179</sup> In addition it is the Executive Director who comments upon the form and nature of the information submitted by the contracting parties pursuant to article III (1)(c)(iii).<sup>180</sup>

As full-time functionaries it is only natural that the Executive Directors provide a means for facilitating communication among those who carry on work between Commission meetings. The scope of this activity and others performed by the Secretariat is elaborated in this passage from the 1965 Administrative Report:<sup>181</sup>

The Secretariat's workload continues to consist for the most part of manuscript preparation, arrangements and staffing for meetings, correspondence in connection with research and publication and facilitation of the interchange of data, biological samples, and scientific observers.

As in past years, the Secretariat has compiled a yearbook of catch statistics for the salmon, halibut, herring and bottom-fish fisheries in areas of common interest to the three member countries, the material for the yearbook being furnished through the cooperation of the national research organizations. The Commission's annual report for 1964 was drafted in part and translated by the Secretariat staff. The bound volume of "Proceedings of the Eleventh Annual Meeting—1964" was prepared, processed and distributed by the Secretariat early in 1965. The Japanese version of the 1964 Proceedings was also prepared at the Secretariat and was processed and bound in Japan with the cooperation of the Japanese National Section.

In August, the Secretariat served as the meeting place for a two-day working group conference of groundfish scientists associated with the three national sections. The principal purpose of the meeting was to discuss possible ways of expediting and improving the work of the Gulf of Alaska Groundfish Committee at the 1965 Annual Meeting. During the year the Secretariat was also favored with visits by Japanese scientists who were in North America to observe halibut and salmon research activities and by staff scientists of the Canadian and United States fishery research organizations. The Executive Director and Assistant Director visited fishery and research installations in the Bristol Bay area in July as guests of the Fisheries Research Institute of the University of Washington and the Bureau of Commercial Fisheries, and they also attended meetings of the International Pacific Halibut Commission, the International Pacific Salmon Commission, and the Pacific Fishery Biologists.

As was noted above with respect to ICNAF, the Executive Director

<sup>178</sup> INPFC Convention, arts. III(1)(c)(iii), (d), (e) and VIII.

<sup>179</sup> See Decisions of the Commission establishing procedure to be followed with respect to requirements of various articles of the convention, in INPFC HANDBOOK 17 (no date).

<sup>180</sup> See 1958 INPFC ANN. REP. 13.

<sup>181</sup> 1965 INPFC ANN. PROC. 73.

of the North Pacific Commission also serves an intelligence role regarding budgetary matters, namely in providing annexes or "explanatory statements" to the Commission in connection with budget estimates.<sup>182</sup> In view of the rigid control otherwise exercised over Commission activities, the Executive Director's initiative in this regard may well be somewhat muted, but the basis for such initiative nonetheless exists.

### *B. Recommendations*

Recommendation embraces the advocacy of proposals to those with authority to exercise decision-making functions. Generally speaking, this is the key formal function performed by all the commissions since seldom is authority conferred to prescribe directly for the regulation of fishery operations. However, this does not mean that commissions do not effectively prescribe. One point to be considered in describing the commissions' operations is the extent to which recommendations of a commission are so uniformly adopted that it may not be inaccurate to regard that commission as possessing authority to prescribe.<sup>183</sup>

At this juncture we are concerned not with commission authority vis-à-vis members but with the competence to make recommendations to the commissions which may be, or may not be, subsequently adopted as official recommendations to members, or which otherwise attempt to mold commission policy.

Participation in the recommending process is widespread, with a variety of groups and individuals contributing as international or intergovernmental officials and as representatives of private groups. Among the former the roles of scientific staff, secretariat members and,

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<sup>182</sup> INPFC HANDBOOK, Financial Regulation 3.3, at 48 (no date).

<sup>183</sup> It is perhaps this distinction which accounts for the seeming mistake in the following assertion regarding the prescriptive competence of the Halibut Commission: "The regulatory powers [of the Commission] have the force of law of each country, subject only to the possible disapproval of the respective governments." CHRISTY & SCOTT, *supra* note 107, at 196-97. A footnote to this sentence states that "FAO, *Comparison and Abstracts*... p. 18, seems to be misinformed on this matter..." The FAO study declared at 18 that "The measures of some Commissions are confined to recommendations (whatever the phraseology) made to Contracting Parties," citing the Halibut Commission, among others. This statement is certainly correct, and Christy and Scott wrong, if the reference is only to the text of the convention. The latter requires the affirmative approval of the parties as a condition of the effectiveness of Commission recommendations; it does not provide that recommendations become effective in the absence of disapproval, as Christy and Scott appear to imply. However, the most important point is that the pattern of practice in uniformly approving Commission recommendation may have, and perhaps has, reached the stage where the Commission can be regarded as itself possessing the competence to prescribe. In other words, description of the actual authority of a governmental body must look beyond the terms employed in conferring formal authority upon it to include the expectations created by the behavior of the parties.



in two instances, panels and regional committees are of special interest. Like the important role they play with respect to the intelligence function, independent scientific staffs also occupy a pivotal position in the recommending process and the reasons for this seem reasonably obvious. In general the persons appointed to the various commissions which have staffs are not scientifically trained in this specialized area, hence it may reasonably be expected that the proposals advanced by staff members equipped with such training would be given particular weight. This is an instance in which skill, in the sense of special training and capacity, serves as a base of power.<sup>184</sup> An examination of the proceedings of the Tuna Commission is especially enlightening in this respect for it is apparent that proposals of the Executive Director, based upon the findings of the staff, are very influential in determining Commission action or, sometimes of equal importance, refusal to take action. Although the annual reports of the Halibut and Salmon Commissions do not provide sound bases for generalizing about the degree of influence of the staff, it seems likely that in these instances too its expertise is an important factor in the eventual Commission decision.

For those commissions with a central headquarters consisting of a secretariat but not a staff, the executive secretary, as chief administrative officer, is sometimes explicitly authorized to make recommendations to the commission on certain matters. For instance, while the primary competence to recommend on the part of the Executive Secretary of ICNAF concerns budgetary matters, at least so far as the Rules of Procedure and the Financial Regulations expressly indicate, it is apparent from the Commission reports that the Secretariat, which is directed by the Executive Secretary, at least reports, and probably makes recommendations, with respect to a considerable range of other matters. This is, of course, wholly in accord with the convention, which provides that the Executive Secretary shall perform such functions as the Commission requires. The Executive Secretary's role in INPFC also includes making recommendations concerning various substantive matters in connection, for example, with coordination of research efforts.

In both ICNAF and INPFC the part played by the Executive Secretary (or Director) in budgetary affairs merits special note. In both groups the authority of this office, expressed in identical financial

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<sup>184</sup> See generally, H. LASSWELL & M. KAPLAN, *POWER AND SOCIETY* 83-92 (1950).

regulations, includes preparation of original budget estimates to which the Executive Secretary may append such annexes or statements, beyond those requested by the Commission, as he deems necessary and useful. To the extent the direction of future Commission work is dependent upon budgetary considerations, this competence embraces substantive concerns as well as those strictly budgetary in nature.

In addition to the delegation to committees of responsibility for devising recommendations, which is normal procedure in the fishery commissions as in any organization, two of the commissions have subgroups, representing different regions within the convention area, which initiate the proposals that the commission may ultimately recommend to members. Within ICNAF, in particular, the panels are the most important components of the Commission for this purpose. Article VIII, the key provision in the convention, declares in paragraph 1 that "*The Commission may, on the recommendation of one or more Panels, and on the basis of scientific investigations, transmit to the depository government proposals, for joint action by the contracting governments. . . .*" (emphasis added). Moreover, while this provision appears to envisage panel recommendations affecting a particular subarea, the panels' competence extends also to making recommendations for the entire convention area. Thus, paragraph 5 provides that the Commission is to consult with all the panels before transmitting proposals affecting the convention areas as a whole. Consultation here appears to permit each panel some measure of competence to make recommendations regarding even areas outside its primary concern. Complementing these primary subjects of recommendation, the panels are authorized to recommend to the Commission "studies within the scope of this Convention which are deemed necessary in the development of factual information relating to its particular subarea."<sup>185</sup>

The panels also have a certain competence with respect to their own composition and subarea of concern. Article IV(2) deals with panel representation and declares that the Commission, "after consultation with the Panel concerned," is empowered to determine such representation. As noted earlier, such "consultation," when required as a preliminary to decision, suggests the capacity to offer recommendations for the ultimate decision. The panels affected may also, if unanimously agreed, recommend that the Commission alter the boundaries of the subareas described in the annex to the convention. Apparently,

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<sup>185</sup> ICNAF Convention, art. VII(3).

however, the Commission is not limited to this procedure for changing the subdivisions of the convention area.

Access by private groups to the recommendation phase in the decision-making process also deserves emphasis in this context, for advisory groups explicitly drawn from private interests are a part of the commission structure in five of the situations here examined.<sup>186</sup> In addition to other activities involving liaison with interested parties within the member states, the advisory committees are occupied with the advocacy of proposals. Such advocacy may take the form both of initiation of proposals for consideration within the commission or a subsidiary body and of response, or counter-proposals, to recommendations made by the commission.<sup>187</sup> In either event this provision for access to the commission presents, at least potentially, some delicate questions of policy for it brings into the formal operation of the decision-making process those potentially subject to regulations. At the present stage in the development of fishery regulatory mechanisms, however, it is unlikely that the public interest is deprived in any substantial way since the commissions themselves are largely limited to making recommendations to member governments. Moreover, the success of the commissions in proposing actions which are in fact implemented depends in some measure upon the concurrence of regulated groups which, within their own states, may be able to wield considerable effective political power. This support of effective power groups is, perhaps, sufficiently useful to warrant the present arrangements. Thought should be given, however, to the inclusion of wider interest groupings as the institutional structure acquires greater direct competence over fishery exploitation.<sup>188</sup>

Wider participation is already possible under the Tuna, Northwest Atlantic, and North Pacific Conventions since in each instance the Commission is authorized to hold public hearings.<sup>189</sup> Only the Northwest Atlantic Commission is limited with respect to the subject-matter of these hearings, article VI(d) referring to hearings "in connection with the development of complete factual information necessary to carry out the provisions of this Convention. . . ." The Commissioners

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<sup>186</sup> See text at notes 51-75 *supra*.

<sup>187</sup> This is most interesting in connection with the Halibut and Salmon Commissions which meet and discuss proposals with advisory groups and thereafter promulgate them, presumably after decisions based on these consultations.

<sup>188</sup> Here, as in other regulatory processes, other features of the public interest may require protection, as for example, representation of consumer groups.

<sup>189</sup> IATTC Convention, art. I(12); INPFC Convention, art. II(9).

of member countries are also specifically authorized to hold public hearings "within the territories they represent." In addition, of course, the regular constitutional or statutory procedure for implementing commission recommendations may, depending on the internal arrangements within each member, permit groups outside the immediately affected industry to have a voice in the ultimate implementation of fishery regulations.

### *C. Prescription*

The function of prescribing is discharged by the promulgation of general policies for regulating interactions that fall within the scope of the authority of the organization. Insofar as external interactions are concerned, *i.e.*, the actual conduct of fishery operations by member states, it is immediately apparent that with only one exception the fishery commissions have not been granted any consequential competence to prescribe.<sup>190</sup> The sole exception is the Salmon Commission, some of whose regulations do not require the subsequent approval of the two member states. Even this exception is weak; although initially all Commission regulations were effective without such approval, in 1957 the provision was changed to stipulate that only "orders for the adjustment of closing or opening of fishing periods and areas in any fishing season and of emergency orders required to carry out the provisions of the Convention" were not subject to approval.<sup>191</sup>

Prescribing for the internal operations of commissions is commonly carried out in varying measure by all component organs and individual officials from the body of the commissioners to the executive secretary or director of the staff. Generally speaking, the various commissions are afforded the predominant role in prescribing, as in such mundane matters as rules of procedure, attendance at meetings by outsiders, financial regulations, and policies regarding recruitment and operation of the staff. However, where there is a director of investigations and a full-time professional staff, as in the Salmon, Halibut, and Tuna Commissions, effective authority to prescribe in certain instances resides in the head of the staff operation, especially in such matters as recruitment policies as well as the day-to-day operations of the staff. Moreover, the executive secretaries in the commissions without staffs also are authorized, on occasion, to lay down general prescriptions, most probably on matters arising in the interval between meetings of

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<sup>190</sup> But see note 182 *supra*.

<sup>191</sup> Salmon Convention, Protocol art. III.

the commission. For example, in both the North Pacific and Northwest Atlantic Commissions, the executive director or secretary "in case of doubt as to the interpretation or application of any of the foregoing (financial) regulations . . . is authorized to rule thereon after consultation with the Chairman."<sup>192</sup> The Chairmen of these two Commissions also have a measure of competence to prescribe as provided in substantially identical procedural rules. They "may make such decisions and give such directions" to the Executive Secretary (or Director), "especially in the intervals between meetings of the Commission," as will ensure that the Commission business "is carried out efficiently and in accordance with its decisions."<sup>193</sup>

Within the Northwest Atlantic Commission the panels have a certain autonomy in prescribing their own rules of procedure for meetings and for the exercise of their other functions. The provision to this effect in article IV(3) has been interpreted to mean that *only* the panel, and not the Commission, has authority to prescribe these rules. It is not known whether this distinction is a mere formality, but it may be meaningful that panel rules were adopted after their "suggestion" by the Commission. Panel chairmen also appear to have a measure of competence to prescribe as a consequence of the panel rule, identical to the Commission rule mentioned above, that the Chairman is entitled "generally, to make such decision and give such directions to the Executive Secretary as will ensure . . . that the business of the Panel is carried out efficiently and in accordance with its decisions."<sup>194</sup>

## V. CONCLUSION

Recent developments in the general world constitutive process of decision-making are most significant for their potential contribution to the task of appraising the decision-making processes involved in regulating international fishery exploitation. In a fundamental decision, the 13th Session of the FAO Conference in 1965 amended the FAO Constitution to establish a Committee on Fisheries as a part of a general reorganization designed to give greater recognition within FAO to the unique importance and urgency of international fishery problems. The Committee is to:<sup>195</sup>

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<sup>192</sup> INPFC HANDBOOK, Financial Regulation 14.2, at 60 (no date); 1965 ICNAF HANDBOOK 60.

<sup>193</sup> INPFC HANDBOOK, Rule of Procedure 14(g), at 33 (no date); 1965 ICNAF HANDBOOK, Rule of Procedure 8(h), at 41.

<sup>194</sup> 1965 ICNAF HANDBOOK, Rule of Procedure 7(g), at 49.

<sup>195</sup> FAO GENERAL RULE XXX, PROVISIONAL REPORT OF THE THIRTEENTH SESSION OF THE CONFERENCE 81 (1965).

(b) Conduct periodic general reviews of fishery problems of an international character and appraise such problems and their possible solutions with a view to concerted action by nations, by FAO and by other governmental bodies. . . .

. . . .

(d) Consider the desirability of preparing and submitting to Member Nations an international convention under Article XIV of the Constitution to ensure effective international cooperation and consultation in fisheries on a world scale. . . .

The Committee first met in June, 1966, and quickly demonstrated its awareness of the need for a close look at the decision-making processes represented by the intergovernmental fishery commissions. In reference to the duties stated in Rule XXX (6) (d), quoted above, the Committee report declares:<sup>106</sup>

The Committee was agreed that in order to adequately perform its function in the field of international cooperation, it needed to define those subjects and areas where such cooperation was needed but not yet effectively provided by existing bodies. The Committee came to the conclusion that the best way of approaching this task was through the establishment of a Subcommittee to review the terms of reference, composition, and activities of existing bodies and to draw from that review suitable conclusions with regard both to the need for further action by the Committee and FAO and also regarding steps that the bodies concerned, or their members, could take in order to ensure their greatest possible success.

The significance of this development should not be underestimated. For the first time on an international level, continuous, informed, and (of most importance) authoritative scrutiny is to be brought to bear on existing institutions directed at fishery management. The fundamental purpose is plainly conceived: to assess their effectiveness and to make recommendations "to ensure their greatest possible success."<sup>107</sup> The committee acknowledged "that an assessment of the effectiveness of existing fishery bodies would be a delicate and difficult task" and that the subcommittee could "determine to what extent it should be attempted."<sup>108</sup> Whatever this determination may be, the FAO Committee on Fisheries could have significant impact on the future structure and management of international fishery organizations.

<sup>106</sup> FAO COMMITTEE ON FISHERIES, FAO FISHERIES REP., No. 33, FAO Doc. Flp/R33 (En), para. 13, at 2 (1966) [hereinafter cited as FAO FISH. REP.].

<sup>107</sup> FAO FISH. REP., para. 13, at 2.

<sup>108</sup> FAO FISH. REP., para. 16, at 3.

Finally, summary reference is here made either to possible improvements in the phases of the decision-making process dealt with herein or to problems involved in attempts to improve the process.

### *A. Capacity*

It is not entirely clear whether serious difficulties have been experienced by reason of the failure to make adequate provision for legal capacity in the fisheries treaties, but it is certain that some difficulties have had to be surmounted. Possibly this can be dismissed as an inconsequential drain upon organizational efficiency. There seems to be no necessity to conclude, however, that the future will so resemble the past that no remedial measures are required. Smoothness and efficiency in operation may come to be of far greater importance in new, or reconstituted, fishery commissions, thus magnifying the contribution of an appropriate provision on legal capacity. As noted, there are no intellectual difficulties involved, nor do we lack the tools for such detailed specification as may be desired.

### *B. Membership*

Assuming, as most observers do, increased participation over the next decade by states in ocean fishery exploitation with resulting greater pressure on resources, provisions for membership in existing conservation groups would appear to need careful examination for possible revision. No doubt all concerned are in agreement that any state with a genuine interest in a particular area, or a stock or stocks of fish, should be included in any organization formed, or recreated, to establish a conservation regime. Apparently the trend is to include as "interested" states those bordering on a region or fishery, whether or not they engage in fishing at all.<sup>199</sup> It does not seem entirely clear, however, that such all-inclusive membership is sound or, indeed, any more advisable than overly restrictive membership provisions. It may be noted, in particular, that voting arrangements calling either for unanimity or some form of majority decision invite problems when some members do not, in fact, have anything at stake in the merits of a decision. Such states are enabled, thereby, more easily to introduce extraneous factors as relevant for their decision.

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<sup>199</sup> See notes 16 and 23 *supra*. See also FAO FISH. REP., para. 22, at 3. The new Atlantic Tuna Commission has no restriction on adherence, beyond membership in the United Nations, a specialized agency.

The whole problem of rationalizing membership is likely to be complicated in the future as the objectives in managing fisheries are broadened to include shared goals in the production and distribution of wealth. If it has been difficult in the past to secure multilateral agreement upon conservation, defined in terms of physical yield, future arrangements aiming at wider goals are likely to confront vastly greater obstacles. Satisfactory provision for membership will then require resolution of the conflicting aims of states with divergent economic, social, and political systems. This consideration underlines also the observation above regarding the inclusion of nonfishing adjacent states which may have no discernible present interest in the problems involved.

### C. Objectives

Obviously this aspect of the fishery agreements requires far greater work and thought for successful revision than any other. Indeed, some observers are sufficiently pessimistic that they would not attempt revision to take account of economic aspects of regulation, at least not without a substantial increment in the level of work done by economists.<sup>200</sup> There is a good deal of attraction in this position, for the simple reason that it is useless to revise old agreements or concur on new ones unless there is some reasonable hope that provisions for allocating yield have validity and acceptability. Acceptability is perhaps more important than validity, yet it may be more difficult to achieve unless we can begin to come up with some disinterested economic analysis and recommendations. Such a task is not now being undertaken and while prospects for study are improving, the prognosis is still not too encouraging. Accordingly the most important recommendation in this respect is to join in urging intensification of economic analysis of the development of ocean resources.

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<sup>200</sup> Mr. Milton James makes the apt observation:

[I]t would be wise to ascertain whether economics of the fisheries are sufficiently well understood to permit their use in practical management. Have economists studied the peculiar circumstances of private exploitation of a public resource deeply enough to enable them to take an active part in its management? If not, it may be fortunate that fishery administrators refrain from attempting to hybridize the sciences of biology and economics on a "Do it Yourself" basis.

CRUTCHFIELD, *supra* note 107, at 25.

Dr. W. M. Chapman has a good many reservations, including concern over the lack of inputs from economists. Indeed, he calls the absence of economists at work on fishery problems the "most ridiculous part" of the recommendation for United Nations jurisdiction over high seas fisheries. Chapman, *On the Management of Ocean Fisheries*, GOVERNOR'S ADVISORY COMMISSION ON OCEAN RESOURCES, PROCEEDINGS OF THE FIFTH MEETING 105 (1966).



*D. Structure of Organization and Distribution of Authority*

In view of the minimal authority granted to fishery commissions it may be unrealistic to cavil about the simplistic organizational structure created for them. In most instances there is no central executive organ and the only continuing body is the staff. Only three commissions have been given a permanent, professional research arm, and it is especially noteworthy that of these only one, the Tuna Commission, was created since World War II. There is then an interesting juxtaposition. On the one hand, there is a widespread favorable appraisal of the fishing industry's record in constantly increasing production since World War II, yet in that same period the most important development in the structure of the fishery conservation groups—the creation of a genuinely independent, international staff—has been permitted to occur but once. When opportunity for such creation was most recently presented at the Atlantic Tuna Conference in May, 1966, it was firmly rejected by those responsible for choice.

The Atlantic Tuna Conference is perhaps instructive in view of the observation that "representatives of seventeen nations widely differing in interest, economic and political ideas, and in degree of development, all collaborated harmoniously to a common purpose."<sup>201</sup> It is true that the delegates managed to produce a convention establishing an Atlantic Tuna Commission and in this sense harmony triumphed. However, the states involved conferred very little authority upon the Commission and did not even endow it with an independent staff. It is easy to produce harmony when the cost is low. The value of this experience is not likely to be great since future problems probably can be resolved only by establishing groups equipped with an appropriate staff and with sufficient authority to deal with the problems they face.\*

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<sup>201</sup> Address by FAO Director-General in FAO FISH. REP., app. D, at 3.

\* This article was submitted in January, 1967. Statements and conclusions of the author are based on information then available and not subsequent thereto.